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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARENGO COUNTY COMMISSION, *et al.*,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States Court of Appeals
For the Eleventh Circuit

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED BY APPEAL

1. Whether amended Section 2 of the Voting Rights Act of 1965 (42 U.S.C. 1973, as amended in 1982) is constitutional, and if so whether it is applicable in the context of this case, and if so whether the Court of Appeals' determination as to the requirements and burden of proof on a Plaintiff suing under this statute is erroneous?

2. Whether the Court of Appeals erred in placing upon Defendants/Appellees the burden of proof on a trial on remand?

3. Is it proper for the Court of Appeals to utilize the lesser standard and burden of proof that it views the 1982 amendments to Section 2 ushered in and apply same to the District Court's 1979 findings; and if so, did the Court of Appeals err in its decision that the District Court was clearly erroneous in its findings and decision?

4. Did the Court of Appeals err in its decision that the District Court was clearly erroneous in its decision that the Plaintiff failed to prove unconstitutional vote dilution resulting from intentional/invidious discrimination respecting the at-large method of election of members of the governing body and school board of Marengo County, Alabama?

LIST OF PARTIES TO PROCEEDINGS

Plaintiff: United States of America acting by and through its Department of Justice.

Defendants: Marengo County, Alabama, a body corporate; the Marengo County Commission, governing body of Marengo County, Alabama; Aubrey L. Glass, President of the Marengo County Commission; D. W. Holt, Grey Etheridge, Jimmie Brame, and Wiley J. Stephens, Jr. (successor in office to James W. Edmonds), Members of the Marengo County Commission; the Board of Education of Marengo County, Alabama; Thomas N. Miller (successor in office to M. W. McKee), President of the Board of Education of Marengo County, Alabama; Joe L. Mason, Robert Tucker, Wallace Flowers, Moses Lofton, Members of the Board of Education of Marengo County, Alabama; Sammie Daniels, Judge of Probate of Marengo County, Alabama, Dwaine Sealey, Clerk of the Circuit Court of Marengo County, Alabama, and W. H. "Billy" Smith, Sheriff of Marengo County, Alabama, all three as members of the Board of Supervisors of Elections of Marengo County, Alabama.

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No.

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OCTOBER TERM, 1984

MARENGO COUNTY COMMISSION, *et al.*,
Appellants,

VS.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States Court of Appeals
For the Eleventh Circuit

JURISDICTIONAL STATEMENT

INTRODUCTION

Appellants, Marengo County, Alabama, a body corporate; its governing body, the Marengo County Commission; its members and Chairman;[1] the Board of Education of Marengo County, Alabama; its members and President;[2] and the members of the Board of Supervisors of Elections of Marengo County, Alabama, submit this jurisdictional statement to show that the Supreme Court of the United States has jurisdiction of the appeal, and that a substantial question is presented and requests the Court to note probable jurisdiction of Appellants' appeal in the above-captioned action.

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[1] Reference is made to the List of Parties to Proceedings for the names of the members and Chairman.

[2] Reference is made to the List of Parties to Proceedings for the names of the members and President.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Alabama is reported at 469 F.Supp. 1150 (S.D., Ala., 1979). A copy of this opinion is attached hereto as Appendix A.

The Order of the Court of Appeals for the Fifth Circuit vacating the District Court judgment and remanding the case for further trial proceedings is not reported but is reprinted as Appendix E.

The Order of the District Court on remand from the Court of Appeals for the Fifth Circuit is not reported but is reprinted as Appendix G.

The decision of the Court of Appeals for the Eleventh Circuit is reported at 731 F.2d 1546 and is reprinted as Appendix I.

JURISDICTION

Appellee brought this suit to challenge the at-large system of electing members of the county commission and board of education of Marengo County, Alabama, under 28 USC 1345 and 28 USC 2201 and 42 USC 1971 (d) and 42 USC 1973 j(f). The opinion of the United States Court of Appeals for the Eleventh Circuit, and subsequent judgment thereunder were entered on May 14, 1984. The jurisdiction of the Supreme Court by appeal is conferred by 28 USC 1254 (2) and 28 USC 2101.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Act No. 17, Acts of Alabama, 1955, respecting the at-large method of selection of members of the governing body of Marengo County, Alabama, is set forth in the Appendix as Appendix A-26.

Act No. 44, Acts of Alabama, 1966, respecting the staggering of terms of the members of the governing body of Marengo County, Alabama is set forth in the Appendix as Appendix A-27.

Act No. 184, Acts of Alabama, 1955, relating to the at-large method of election of members of the Board of Eduction of Marengo County, Alabama, is set forth in the Appendix as Appendix A-28.

Act No. 45, Acts of Alabama, 1966, respecting the staggering of terms of the members of the Board of Education of Marengo County, Alabama, is set forth in the Appendix as Appendix A-29.

The Provisions of Amendment XIV to the Constitution of the United States reads as follows:

> SECTION 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> SECTION 2: Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president

and vice president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

SECTION 3: No person shall be a senator or representative in congress, or elector of president and vice president, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may, by a vote of two-thirds of each house, remove such disability.

SECTION 4: The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5: The Congress shall have power to enforce, by appropriate legislation the provisions of this article.

The Provisions of Amendment XV to the Constitution of the United States reads as follows:

SECTION 1: The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

SECTION 2: The congress shall have the power to enforce this article by appropriate legislation.

Section 2 of the Voting Rights Act of 1965, as amended in 1982 by Pub. L. No. 97-205, 96 Stat. 131 (42 USCA, Section 1973, as amended) reads as follows:

A. No voting qualification or prerequisite to voting or standard, practice or procedure shall be imposed or applied by any state or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in Section 4 (f) (2), as provided in subsection (b).

B. A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

STATEMENT UNDER RULE 28.4(c)

Because this suit draws into question the constitutionality of Acts No. 17 and 184, Acts of the Legislature of Alabama of 1955, and Acts No. 44 and 45, Acts of the Legislature of Alabama of 1966, 28 U.S.C. § 2403(b) (1976) may be applicable. No Court of the United States, as defined by 28 U.S.C. § 451 (1976), has certified to the Attorney General for the State of Alabama, pursuant to 28 U.S.C. § 2403(b), the fact that the constitutionality of the above stated legislative acts has been drawn into question.

STATEMENT OF THE CASE

I. MARENGO COUNTY, ALABAMA

Marengo County, Alabama is located in west central Alabama and by 1980 census figures has 25,047 residents (23,819 for 1970), of whom 10,662 (46.6%; 44.8% for 1970) are white and 13,346 (53.2%; 55.2% in 1970) are black. The 1970 Census reflects that 50.8% of the voting age population was black and 49.2% white. In 1970, 6,302 (or 43.9%) of the registered voters were black and in 1978, 7,965 (or 42.3%) were black. The County covers 978 square miles. Under 1955 statutes of the Alabama Legislature the four members of the Marengo County governing body (the County Commission) and the Marengo County Board of Education are elected at-large, with district residency requirement, with the chairman elected at large with no residency requirement. In 1966 the Legislature passed statutes staggering the terms of the members of the County Commission and School Board. There is a majority vote required for party primary elections but not in the general election. No black persons have been elected to the County Commission in recent times; however, blacks were elected to and presently serve as County Coroner and as a Board of Education member. There are no slating organizations nor official impediments to black access to the political process. 731 F2d 1546,

at 1569, and 469 F.Supp. 1150, at 1157. There is no evidence of racial appeals, overt or subtle, in elections in Marengo County. 731 F2d 1546, 1571.

II. PROCEEDINGS BELOW

The instant litigation was filed in August of 1978 by the United States Department of Justice. In the fall of 1978 and in early 1979 the District Court conducted trial of this case with an earlier case, receiving both lay and expert testimony and other evidence. In April of 1979 the District Court rendered its findings of fact and conclusions of law and rendered a judgment for the Defendants. The Plaintiff prosecuted an appeal to the United States Court of Appeals for the Fifth Circuit, and then filed aa Motion in said Court of Appeals to hold the appeal in abeyance pending decision by the Supreme Court in the case of *City of Mobile v. Bolden*[3] which was then pending as Case No. 77-1844 in the Supreme Court. After the decision of the Supreme Court in the *Bolden* case in August of 1980 the Court of Appeals granted the Motion of the Plaintiff-Appellant to remand this case to the District Court for further proceedings in light of the Supreme Court opinion in *Bolden*.[4] The District Court on remand declined to receive additional evidence, and on July 30, 1981 rendered a judgment in favor of the Defendants and an Order in which it determined that absent proof of unresponsiveness a *prima facie* case could not be maintained by the Plaintiffs under the *Lodge v. Buxton*[5] decision rendered by the Court of Appeals for the Fifth Circuit.[6] Plaintiff thus prosecuted another appeal, this time to the newly created Court of Appeals for the Eleventh Circuit. In January of 1982 the

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[3] 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980)

[4] 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980)

[5] 731 F2d 1546, at 1550 and 1574-5

[6] See Appendix G

Eleventh Circuit Court of Appeals granted the Motion of the Appellant to hold the appeal in abeyance pending action by the Supreme Court in the case of *Rogers v. Lodge* which was the changed style of the case of *Lodge v. Buxton, ante.*

Subsequent to the decision of the Supreme Court in the Lodge case, and to the amendment in the summer of 1982 of Section 2 of the Voting Rights Act of 1965 which became effective June 29, 1982, the Court of Appeals for the Eleventh Circuit conducted in October of 1983 oral arguments in this case. In May of 1984 the Court of Appeals rendered its decision in this case vacating the District Court's findings that the Plaintiffs did not establish discriminatory intent and reversing the district Court's judgment insofar as it had held that the at-large election system did not have a discriminatory result as of the time of trial and remanding for further proceedings in light of the opinion of the Court of Appeals. The Court of Appeals' decision contained a holding that the record showed "... a clear violation of the results test adopted by Congress in Section 2 of the Voting Rights Act,"[7] but declined to render a judgment and remanded the case directing the District Court to allow the parties to update the record and to supplement the record with evidence that might tend to affect the Court of Appeals' finding of discriminatory results as of the time of original trial and potentially for fashioning of a remedy.[8]

The District Court in the decision that it made after trial proceedings in late 1978 and early 1979 utilized an analyzation of the testimony and evidence based upon the factors set out in the case of *Zimmer v. McKeithen,* 485 F2d 1297 (5th Cir., 1973) (*en banc*) aff'd on other grounds sub nom. *East Carroll Parish School Bd. v. Marshall,* 424 U.S. 636 (1976), and under the existing case law at the time of its decision weighed the *Zimmer*

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[7] 731 F2d 1546, at 1574

[8] See Appendix I

factors individually and then in the aggregate, and considered whether the Plaintiff had established its burden of proof in showing discriminatory intent in either the enactment or maintenance of the statutes being challenged. The factors considered by the district Court included, *inter alia,* slating, access to the political process, responsiveness of elected officials to the black population of Marengo County, State policy respecting at-large elections, past discrimination and its effect, if any, on present participation by black citizens in the political process and certain enhancing factors. The District Court made extensive findings of fact respecting each of these factors and certain sub-factors thereunder.[9]

The Eleventh Circuit Court of Appeals in its 1984 decision applied its version of the requirements of amended Section 2 of the Voting Rights Act of 1965[10] and discussed a number of the factors considered by the district Court in its 1979 decision. Of the factors that the Court of Appeals speaks to there is included, among others, the appointment of poll officials regarding the conduct of elections in Marengo County, Alabama and the operation of the Board of Registrars of Marengo County, Alabama, which handles the registration of voters in the County, which two factors are governed not by the statutes applicable to the at-large elections challenged here but under general State law in Alabama.[11] The Court of Appeals' decision differs in its conclusions about the significance and relevance of the testimony and evidence in the record respecting these factors. Another factor that the Court of Appeals differed in its decision as compared with the decision of the District Court respects the effect of socio-economic data on the question of access to the political process.[12]

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[9] 469 F.Supp 1150

[10] 42 U.S.C. A Section 1973 as amended

[11] See 731 F2d 1546, at 1569-70

[12] 731 F2d 1546

A reading of the requirements of Rule 15.1(g) would indicate that this statement of the case would contain facts material to consideration of the questions presented. Because the standard of appellate review involves a review of whether the lower court's findings were "clearly erroneous"[13] it is important to view the context of some of the factual matters that the Court of Appeals considered and discussed in its opinion. The Court of Appeals gave great emphasis to the question of apathy stating that there was ". . . certainly no substantial evidence in the present case to support an attribution of depressed black political participation to 'apathy' . . ."[14] What the Court of Appeals fails to recognize (and it failed to give any citation in the record in this regard) is that the Plaintiff did not adduce any evidence or testimony that shows any causal connection between low black voter turnout and any of the principal elements of a vote dilution case. The Appeals Court is not able to cite to the record in this regard as the record does not contain any evidence of any such causal connection between black voter turnout and facts such as past discrimination (and some presumed effect on present political participation), educational and socio-economic situation and the like.

Likewise, the Court of Appeals in a 28 line paragraph is unable to cite any portion of the extensive trial Court's record in this case to show that blacks in Marengo County do not have access to the political process.[15] It does mention the factors of the time of operation of the County Board of Registrars and the racial makeup of the poll officials in the County.[16] It concluded in essence that the District Court was clearly erroneous in its

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[13] *Rogers v. Lodge,* 458 U.S. 613 102 S.Ct. 3272, 73 L.Ed 2nd 1012 (1982)

[14] 731 F2d 1546, at 1569

[15] 731 F2d 1546, at 1569

[16] 731 F2d 1546, at 1569-70

findings respecting these two factors because fewer blacks are registered to vote.[17] The Appeals Court does this with no citation to the record to show causal connection of these factors to any alleged lack of access of blacks to the political processes. The burden of proof is on the Plaintiff to show such a lack of access to the political processes and it failed to do so; for aught it appears from the record all blacks who wanted to register to vote, run for office, be appointed as a poll official, or otherwise participate in the political processes in Marengo County did so. Blacks outnumber whites in Marengo County in both population and voting age population and the Plaintiff failed to show any lack of success by black political candidates to be the result of any discrimination or dilution or abridgment of the right to vote and participate in the political process.

This is also true with regard to the responsiveness factor. The Court of Appeals resorted to a vague "political responsiveness" factor and attempted to tie this to racially polarized voting and to tie in the access factor of voter registration to the responsiveness factor.[18] The record is abundant with evidence of responsiveness on the part of the County Commission Defendants to the needs and particularized needs of black citizens,[19] and in light of the evidence the Trial Court concluded that the school system was unitary and afforded equal educational opportunities.[20]

Another factor that the Court of Appeals lays heavy emphasis on in its decision respects the factors of socio-economic status. While it cites Senate reports[21] and certain case law,[22] it again is

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[17] 731 F2d 1546, at 1570

[18] 731 F2d 1546, at 1573

[19] 469 F.Supp 1150, at 1165-70 and 1176; 731 F2d 1546, at 1573

[20] 469 F.Supp 1150, at 1170

[21] 731 F2d 1546, at 1568-69

[22] 731 F2d 1546, at 1568-69

unable to cite any portion of the record showing a causal connection between socio-economic factors and the voting process. To shift the burden of proof in this context would require the Defendant to prove a negative. Moreover this observation is even more illustrative in the context of the "apathy" question which the Court of Appeals cites in its language dealing with socio-economic factors. Another factor the Appeals Court dwells upon is that of past discrimination and alleged lingering effect therefrom.[23] Its observations on this point, which include the socio-economic factors, are certainly crystal clear examples of "original sin" which the plurality panel in the *City of Mobile v. Bolden*[24] so aptly pointed up.

The foregoing four paragraphs set out "factors" and conclusions therefrom upon which it is obvious that the trial court and the Court of Appeals disagree. We include these paragraphs to illustrate to the Court that the Court of Appeals has supplanted its own decisions and findings for that of a trial judge who not only had heard and considered extensive testimony and evidence but who was also familiar through other litigation with the Marengo County Board of Education and we do this because one of the questions on this appeal is to be reviewed under the clearly erroneous rule of review.[25]

Regarding the stage of the proceedings in which the questions sought here to be reviewed were raised, it is noted that all of the questions were raised in the Court of Appeals. Primarily, this results from the fact that the appeal by the Plaintiff is based upon and presents only the issue of the provisions of amended Section 2 of the Voting Rights Act of 1965,[26] which was enacted after the case was appealed the second time (being the appeal to

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[23] 731 F2d 1546, at 1567-69

[24] 446 U.S. 55, at 75; 100 S.Ct. 1490, at 1503

[25] *Rogers v. Lodge,* 458 U.S. 613 102 S.Ct. 3272, 73 L.Ed 2nd 1012 (1982)

[26] 42 U.S.C. 1973

the newly created 11th Circuit Court of Appeals). The Plaintiff/Appellant presented the issue as to whether the at-large system for electing the County Commission and School Board results in a denial or abridgment of the right to vote within the meaning of amended Section 2, and the Defendant/Appellees raised in the Court of Appeals the questions of the constitutionality of amended Section 2, its applicability to the appeal, whether a vote dilution claim is cognizable under the 15th Amendment and/or the Voting Rights Act and whether the District Court's findings were clearly erroneous. The District Court, of course, did not have the amended Section 2 to consider in any of its deliberations prior to the rendition of the May 14, 1984 decision of the the Court of Appeals.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The instant lawsuit was tried by the District Court in the fall of 1978 and in early 1979, with the District Court rendering its decision and judgment in late April of 1979. An appeal was prosecuted by the Plaintiff to the former Court of Appeals for the Fifth Circuit and then the case was remanded for further consideration by the District Court in light of the opinion of the Supreme Court in the case of *City of Mobile v. Bolden, ante.* In the summer of 1981 the District Court declined to take additional evidence on remand in light of its construction of the decision of the Court of Appeals in the case of *Lodge v. Buxton, ante,* and after appeal by the Plaintiff to the Court of Appeals for the Eleventh Circuit the Supreme Court rendered its decision in the case of *Rogers v. Lodge, ante,* and the Congress of the United States enacted an amendment to Section 2 of the Voting Rights Act of 1965. The Court of Appeals for the Eleventh Circuit, in rendering its decision in May of 1984, considered the amended Section 2 of the Voting Rights Act of 1965, determined said amendment to be constitutional, determined said amended statute to be applicable to the appeal before it, set out its view of the meaning and effect of the amended Section 2, held that the District Court was "clearly erroneous", declined to render a judgment for the Plaintiff, vacated the judgment of the District Court and remanded the case to the District Court to allow the parties to up-date the record and supplement the record with evidence that might tend to affect the Court of Appeals' finding of discriminatory results, and required that the Defendants bear the burden of establishing changed circumstances since the time of trial.

It is clear that the decision of the Court of Appeals on May 14, 1984, applying its version of amended Section 2 of the Voting Rights Act of 1965 and determining that the findings of the District Court were "clearly erroneous" constitutes a finding that the statutes providing for the at-large method of selection of members of the County governing body and school

board of Marengo County, Alabama had a discriminatory result in 1979 and under the amended Section 2 of the Voting Rights Act, being a statute of the United States passed under the enforcement clauses of the XIV and XV amendments, had a discriminatory effect and were in violation of said amended Voting Rights Act and were unconstitutional at that time. Moreover, the Court of Appeals' decision finding the State statutes to have a discriminatory effect prohibited by amended Section 2 and thus being unconstitutional in nature as of the time of trial, given the language of the decision of the Court of Appeals and its directions to the District Court respecting proceedings on remand, tailor the proceedings on remand to be affected by the finding of unconstitutionality in 1979.[27]

If upheld or left in effect, the decision of the Court of Appeals will not only unlawfully shift the burden of proof on trial on remand to the Defendants, but will, as a result of the finding of constitutionality of amended Section 2 and applicability to the instant case, which was tried prior to the passage of the amendment, affect the large number of cases which similarly challenge the constitutionality of at-large election methods for

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[27] The action taken by the Court of Appeals is its May 14, 1984 decision might make it appear that an appeal of that decision would be proper only after proceedings on remand; yet, the decision of the Court of Appeals clearly reflects a declaration that the Alabama statutes being challenged were in violation of the Federal Enforcement Act under the 14th and 15th Amendments (being Section 2 of the Voting Rights Act of 1965 as amended in 1982) and shifts the burden of proof to the Defendants on the proceedings on remand in the trial court. Moreoever, the trial court would, in the event it ruled for the Plaintiff on remand, begin the stage of the litigation which would involve devising a remedy. The Court of Appeals vacated the District Court decision regarding the intent factor, reversed the District Court decision as respected the statutory matters, and remanded for further proceedings. The Defendants-Appellants, because of the Court of Appeals' decision declaring the State statutes unconstitutional 1979 and shifting the burden of proof on trial on remand, view the Appeals Court decision as being of such finality in nature in such regards as to support an appeal at this time.

various municipalities and counties throughout the nation. The decision of the Court of Appeals upholding the constitutionality of amended Section 2 of the Voting Rights Act of 1965 is a decision which involves some of the same constitutional questions (respecting the requirement of intentional or invidious discrimination) that the divided Supreme Court considered in the case of *Mobile v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed. 2d 47 (1980).

Further, the Court of Appeals' decision as to the construction of amended Section 2 (what it means and requires in terms of proof) has not been passed upon by this Court and has a substantial impact on both (1) the large number of vote dilution cases pending in the lower federal courts and (2) many at-large election systems which have not been challenged in a court.

The application by the Court of Appeals of amended Section 2 of the Voting Rights Act of 1965 raises the question of whether, in view of the fact that the statute had not been amended at the time of trial or the trial court's decision, said application in the context of this case constitutes an *ex post facto* law forbidden under Article 1, Section 9, Clause 3 of the Constitution of the United States, same in view of the provisions of Section 12 of the Voting Rights Act of 1965 providing that violations of Section 2 are punishable as criminal offenses (42 U.S.C. 1973 j(a), (c) (1976) (reference footnote 12 of the Court of Appeals' decision, 731 F2d 11546, at 1554).

CONCLUSION

For the foregoing reasons, the questions are substantial, and the Court should note probable jurisdiction.

Respectfully submitted.

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 77-445-H

JAMES CLARK, JR., et al.
Plaintiffs,

vs.

MARENGO COUNTY, et al.,
Defendants.

Civil Action No. 78-474-H

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MARENGO COUNTY COMMISSION, et al.,
Defendants.

The first of the above-styled consolidated actions was initiated on August 15, 1977 by the filing of a complaint by Reverend James Clark, Jr., L. O. Hope, Clinton Agee, Teresa McNeal, John Davis, Robert Jones, and Eddie Ayers as purported representatives of a class composed of all black persons in Marengo County, Alabama. The defendants named in this complaint were Marengo County, a political subdivision of the State of Alabama; Sammy Daniels, individually and as Probate Judge of Marengo County; William H. Smith, individually and as Sheriff of Marengo County; Dwayne Sealey, individually and as Clerk of the Marengo County Circuit Court; Frank J. Norris, Jimmy Brame, James E. Edmonds, Grey Ethridge, and D. W. Holt, individually and as members of the Marengo County Board of Revenue; (Marengo County Commission); W. McKee

and T. H. Miller, individually and as members of the Marengo County Board of Education; Joseph C. Camp, individually and as chairman of the Marengo County Democratic Executive Committee; and Robert Vance, individually and as chairman of the Alabama State Democratic Executive Committee.

For purposes of clarity, Civil Action No. 77-445-H will hereafter be referred to as the class action, while Civil Action No. 78-474-H will be referred to as the enforcement action.

The class action complaint alleged that black voters in Marengo County, Alabama are being deprived of their constitutional rights under the First, Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution by virtue of the fact that members of the Marengo County Commission and the Marengo County Board of Education are elected at large, and by virtue of the fact that the Marengo County Democratic Executive Committee is elected from allegedly malapportioned, multi-member districts, resulting in dilution or cancellation of black voting strength. The class action plaintiffs request that this Court declare the Acts under which the Marengo County Commission and Board of Education are elected to be unconstitutional, declare the present method of electing County Democratic Executive Committee members to be unconstitutional, and to enjoin the certification of any future elections conducted in such an allegedly improper manner.

Upon a joint request by the parties, the Court allowed a nine month discovery period to and including June 1, 1978. The plaintiffs engaged in absolutely no discovery efforts in this period, which their attorney attributed to lack of finances. The Court notes that interrogatories were filed on the plaintiffs' behalf two months after the close of the discovery period—approximately three months late. The plaintiffs' counsel averred that his efforts had been directed toward securing intervention by the Department of Justice, rather than toward conducting discovery.

On December 9, 1977 the Court dismissed the class action complaint as against defendant Camp and the Marengo County Democratic Executive Committee on the authority of *Ray v. Blair,* 343 U.S. 214, 72 S.Ct. 654, 96 L.Ed.2d 852 & 894 (1952), and *Ray v. Garner,* 257 Ala. 168, 57 So.2d 824 (1952), holding that the election of County Democratic Executive Committee members was within the purview by law of the State Committee. *See Ala. Code,* § 17-16-8.

The desires of the class action plaintiffs' counsel were finally fulfilled on August 25, 1978, when the Attorney General filed Civil Action No. 78-474-H, the enforcement action. In this suit the United States of America is the plaintiff. The named defendants are the Marengo County Commission and its members as set out above; the Marengo County Board of Education, its members as set out above, and other members Robert Tucker, Wallace Flowers, and Moses Lofton; Marengo County Probate Judge Sammy Daniels; J. C. Camp as chairman of the Marengo County Democratic Executive Committee; and J. Marks Abernathy as chairman of the Marengo County Republican Executive Committee. A recent amendment to the complaint added as defendants Sheriff William H. Smith and Marengo County Circuit Clerk Dwayne Sealey.

The allegations of the enforcement action complaint are identical to those of the class action with respect to the at-large election of the Marengo County Commission and the Marengo County Board of Education, with contentions that such elections have served to dilute or cancel black voting strength in violation of the Fourteenth and Fifteenth Amendments to the United States Constitution. The government requests that this Court declare the at-large systems employed in the election of both the County Commission and the Board of Education to be violative of the Fourteenth and Fifteenth Amendments, to enjoin any future such at-large elections, and to require the adoption of an election system employing fairly drawn district lines for the conduct of future elections.

In each of the actions the defendants have denied that any aspect of the electoral system in Marengo County has served to deprive black persons of the right to vote or has concelled or diluted their voting strength. On August 31, 1978 the Court consolidated the two cases for trial purposes, and the matters came on for trial before the Court in Selma, Alabama, on October 23, 1978, and on January 4, 1979. The Court, having considered the testimony and exhibits adduced at trial, the record in this case, and the arguments and memoranda of law propounded by counsel for all parties, together with the applicable law, finds as follows:

Findings Of Fact

1. Marengo County, Alabama, is a rural county located in West Central Alabama. It is bordered by Clarke County to the South, Wilcox and Dallas Counties to the East, Perry, Greene, and Hale Counties to the North, and Sumter and Choctaw Counties to the West. In 1950, Marengo County had a population of 29,494, consisting of 9,018 whites (31%) and 20,473 blacks (69%). The population decreased to 27,098 by 1960, with 10,270 whites (37.9%) and 16,828 blacks (62.1%). *General Population Characteristics, Alabama,* U. S. Department of Commerce Bureau of the Census, pp. 2-85 (1960) [hereinafter 1960 Census]. The 1960 Census further reflects that of the 13,895 persons of voting age in Marengo County in 1960 there were 7,791 blacks (56.1%) and 6,104 whites (43.9%). By 1970 the population in Marengo County had declined to 23,819, with 13,157 blacks (55.2%) and 10,662 whites (44.8%). *General Population Characteristics, Alabama,* U. S. Department of Commerce Bureau of the Census (1970) [hereinafter 1970 Census]. The 1970 Census reflects taht the voting age population was 14,113, with 7,164 blacks (50.8%) and 6,949 whites (49.2%). These figures indicate an exodus of blacks from Marengo County and a fairly stable white population.

The statistical evidence, as well as this Court's observations, indicates that the Marengo County populace has serious socio-economic shortcomings, especially in the areas of literacy and economy. The 1970 Census figures reveal that 744 of the 11,861 persons of 25 years of age and older had never attended school and that 1,652 of that number had completed only four years of education or less, establishing that 20.2% of the total 1970 population aged 25 years or older had either never attended school or had not completed more than four years of formal education. The same census figures reveal that in 1970 there were 5,905 black persons in Marengo County aged 25 years or older, that 690 of these had never attended school, and that 1486 of these had attended school for four years or less. Thus, the 36.9% of the black population over 25 years of age either never attending school or completing four years or less greatly exceeds the county-wide percentage of 20.2%. The figures further reveal that of the 2,244 Marengo County families who were below the poverty level in 1970, 1,841 (82%) were black, and that while the median income for all families in 1970 was $4,909.00 with a mean income of $6,478.00, the black family's median income was $2,456.00 and its mean income was $3,175.00. *General Social and Economic Characteristics, Alabama,* Tables 124 & 128, U. S. Department of Commerce Bureau of the Census (1970). The housing figures from the 1970 Census depict a similar pattern of black poverty. 3,045 (40%) of the 7,341 housing units in Marengo County in 1970 lacked some or all plumbing facilities, and 2,440 (71%) of the 3,357 housing units with black heads of household lacked some or all of such facilities. *General Housing Characteristics, Alabama,* pp. 2-74, U.S. Department of Commerce Bureau of the Census (1970). According to a 1976 survey, 2,824 (36%) of the 7,990 housing units in Marengo County were rated "sub-standard." State Housing Plan (June 1976) of the Alabama Development Office (Gov. Exhibit 47). Finally, Census figures reveal that the 1970 per capita income in Marengo County was $1,639.00, while for black persons it was only $722.00 (1970 Census, pp. 2-378 & 2-402).

From the foregoing figures, as well as from the Court's own observations, the Court finds that blacks in Marengo County still have a long way to go before they will have achieved socio-economic parity with the whites.

2. The Marengo County Commission was previously known as the Marengo County Board of Revenue and was created by Legislative enactment in 1923 to replace the pre-existing Court of County Commissioners. 1923 *Local Acts of Alabama,* No. 11, at 188. The Act provided that in the s1924 election and every four years thereafter the Board of Revenue was to be headed by a president elected at-large by the county electorate and was to be otherwise composed of four members, each repreesenting a different residency district. The districts and the precincts comprising them were as follows:

Northeast: Faunsdale, Macon, Dayton, Thomaston, and McKinley;

Southeast: Magnolia, Pineville, Dixon's Mills, and Shiloh;

Southwest: Myrtlewood, Hills, Nanafalia, Horse Creek, Hoboken, and Sweetwater; and

Northwest: Demopolis, Jefferson, Springhill, Jackson Store, and Linden. Under the 1923 Act, persons seeking a district board member's position ran only in the district in which they resided and were thus not answerable to voters residing in other districts.

In 1955 the 1923 legislation was amended to provide that a candidate seeking a board position had to run from the district in which he resided, but his candidacy was subject to the vote of the entire county electorate. 1955 *Acts of Alabama,* No. 17, at 45. Thus, for example, a candidate seeking a position on the Board representing the Northeast section would have to run against other persons who resided in the Northeast section but he would have to receive a majority vote of all voters in the county before he could be elected.

In 1966 the Act establishing the Board of Revenue was again amended by the Alabama Legislature. 1966 *Acts of Alabama,* No. 44, at 67. Act No. 44 required the election of a Board of Revenue member for the northwestern and the southeastern districts in 1968 and every four years thereafter, and the election of the at-large president and the northwestern and southwestern representatives in 1970 and every four years thereafter, thereby creating staggered terms. The 1966 amendment continued the rule set down in the 1955 amendment that any candidate for a Board of Revenue position be a resident of the district that he or she sought to represent for two years prior to his or her election or appointment.

This is the system under which the Marengo County Commission is now elected. The president of the Commission is elected at large and the members of the Commission, although required to run against other candidates in the district in which they reside, are also subject to a county wide at-large vote.

3. The Marengo County Board of Education was first subjected to state legislation in 1935.[1] In that year, the Legislature passed an Act "[t]o further provide for and regulate the selection, qualification and election of the members of the Board of Education of Marengo County." *1935 Local Acts of Alabama,* No. 183, at 106. Section 1 of the Act required that the Board consist of four members and a president. Section 2 provided that the president be elected at-large, and that the four other members of the Board be elected by district in the same manner and from the same districts as were used in the election of the Marengo County Board of Revenue under the 1923 Act. The Act went on to require that all candidates for Board membership be a resident of the district that he or she is elected to represent both at the time of the election and at all times during his or her continuance in office. Section 3 set out a six year term for

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[1] As best the Court can ascertain, the election of the Marengo County Board of Education prior to 1935 was governed by the general statewide legislation.

each Board member and for the president, with all five members being elected during the same general election and every six years thereafter.

The preceding Act was amended in 1955 to require that a candidate for a Board position other than president be a resident of the district from which he or she is running for at least two years prior to his or her election, to require county-wide at-large elections instead of district elections, and to alter the terms of office to four years, commencing with the 1956 election for the four members, and the 1960 election for the president. *1955 Acts of Alabama,* No. 184, at 458.

The law was last amended in 1966 to provide for staggered terms similar to those employed in the Marengo County Board of Revenue elections. *1966 Acts of Alabama,* No. 44, at 67. Board members for the northeastern and southeastern districts were to be elected for four year terms in 1968, while the presidency and the northwestern and southwestern positions were to be contested in 1970 with subsequent four year terms.

4. Both the class action plaintiffs and the government have alleged that the above-styled methods of electing the Marengo County Commission and the Marengo County Board of Education unconstitutionally dilute and cancel black voting strength. There can be no question but that the at-large scheme cannot be held to be per se unconstitutional. *White v. Regester,* 412 U.S. 755, 765, 93 S.Ct. 2332, 2339, 37 L.Ed.2d 314, 324 (1973); *Mahan v. Howell,* 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973). However, a plaintiff may establish the constitutional infirmity of such a system by demonstrating that a class of persons "had less opportunity than did other residents of the district to participate in the political processes and to elect legislators of their choice." *White v. Regester, supra,* at 766, 37 L.Ed.2d at 324.

The Fifth Circuit, drawing from the Supreme Court opinion in *Whitcomb v. Chavis,* 403 U.S. 124, 91 S.Ct. 1858, 29

L.Ed.2d 363 (1971), has stated the considerations by which a District Court is to be guided in its deliberations on a voter dilution case:

> [W]here a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot provisions and the lack of provision for at-large candidates running from particular geographical subdistricts. The fact of dilution is established upon proof of the existence of an aggregate of these factors. The Supreme Court's recent pronouncement in White v. Regester, *supra,* demonstrates, however, that all these factors need not be proved in order to obtain relief.

Zimmer v. McKeithen, 485 F.2d 1297, 1305 (5th Cir. 1973) (en banc) (footnotes omitted). Accordingly, this Court's first duty is to enter findings, as revealed by the evidence, with respect to each the primary and enhancing factors set out in *Zimmer.*

A. Slating.

5. On the question of lack of openness in the slating process or candidate selection process to blacks, *Zimmer* requires the Court to consider whether either through law, custom, or practice blacks have been to any extent denied access to the slating procedures in Marengo County. 485 F.2d at 1305 n.20.

Blacks in Marengo County were faced with extensive racial discrimination, both public and private, prior to the Voting Rights Act of 1965. While such discrimination undoubtedly continues in some areas of the county, the Act itself was the

progenitor of a significant decrease in racially discriminatory practices. This diminution of discriminatory practices can be in large part attributed to orders of the federal court, congressional legislation, and efforts for change among the people of Marengo County, both white and black. Of course, while the late 1960's and the 1970's have seen great advancements in educaitonal, employment, and social opportunities for black citizens, there can be no question, as this Court noted in *Bolden v. City of Mobile,* 423 F.Supp. 384, 387 (S.D. Ala. 1976), *aff'd,* 571 F.2d 238 (5th Cir. 1978) (per Pittman, Ch. J.), but that "[t]he prevasive effects of past discrimination still substantially affect political black participation."

There is no allegation, and indeed there could be none, that the discrimination against black Marengo County voters arises out of law or official policy. Since the 1965 Act blacks have been entitled to vote without hindrance and there is no prohibition against blacks seeking any county office. The discrimination charged here is more subtle than that, and the issue for the Court is whether, notwithstanding the facially non-racial procedures, the processes "leading to nomination and election [are] . . . equally open to participation by the group in question . . . ." *White v. Regester, supra* at 766, 93 S.Ct. at 2339, 37 L.Ed.2d at 324.

The first consideration of the Court is the number of black candidates who have sought county office and the number who have succeeded. "The very fact that there have been such candidacies is 'suggestive of the fact that there is minority access to the nomination process.' " *Hendrix v. Joseph,* 559 F.2d 1265, 1268 (5th Cir. 1977), *quoting David v. Garrison,* 553 F.2d 923, 929 (5th Cir. 1977).

6. The evidence before the Court indicates that there had been no black candidates for any Marengo County office prior to the passage of the Voting Rights Act of 1965. Since 1966, however, the record is clear that blacks have sought such positions on many occasions, for the most part unsuccessfully.

7. In the May 3, 1966 Democratic primary, Annye Braxton become the first black to seek office in Marengo County when she ran for County Tax Assessor. She was opposed by three white men and she received a plurality (41%) of the 3,869 votes cast in the primary, to 2,626 votes received by her closest challenger (Government Exhibit 31). She was defeated by her white challenger, Sam Drinkard, in the Democratic primary run-off on May 31, 1966 by a vote of 5,461 to 4,041 (Government Exhibit 31).[2] The record reflects that Braxton carried many boxes in both the primary election and the run-off in predominately black areas such as Dayton, Dixon's Mills, Faunsdale, Putnam, Jefferson, Magnolia, McKinley, and Spring Hill, while she suffered great setbacks in many Demopolis and Linden boxes, in Lasca, in Macon, in Sardis, in Sweet Water, and in Wayne.

8. There were several black candidates in the November 1968 general election who assumedly ran as independents. All of these candidates were defeated, each receiving 34% to 37% of the vote. The two black candidates for delegates to the 1968 National Democratic Convention lost, although both won their way into the Democratic Primary run-off before being defeated.

9. In the May 5, 1970 Democratic primary the only black candidate was Joe Reed, who opposed two whites for Marengo County's seat in the state House of Representatives. Reed ran second in the primary, receiving approximately 37% of the vote. In the run-off Reed was defeated by 1,350 votes. Reed's strength was more or less in the same boxes as Braxton's had been in 1966, as were his weaknesses.

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[2] Braxton testified at trial that she lost the run-off by about 200 votes and alleged that there were voting irregularities condoned in the form of deceased persons having ballots cast in their names. She stated that she passed her suspicions on to county officials and received no response. However, Braxton testified that she merely suspected such abuses and had no proof, and in light of the large number of votes by which Drinkard won, the Court sees no reason to give credence to such unsubstantiated suspicions.

10. 1970 was a peak year for the National Democratic Party of Alabama, a state black political party whose purpose was to run black candidates for political office.[3] In the general election conducted on November 3, 1970, there were blacks on the ballot for almost every office contested, both county-wide and state-wide. In the Governor's race, NDPA candidate John Cashin ran second to the eventual winner George C. Wallace in Marengo County, receiving almost 40% of the votes cast. The same was in large part true with respect to the Lieutenant Governor's race, where the NDPA's Isaiah Hayes, III received approximately 36% of the Marengo County vote in losing to eventual winner Jere Beasley. In both of these races the blacks did well in the traditionally black areas such as Dayton, Dixon's Mill, Faunsdale, Jefferson, Magnolia, McKinley, and Spring Hill, while losing in most Demopolis and Linden boxes and in the traditionally white areas of Lasca, Macon, Sardis, and Sweetwater. This is the same pattern as was seen in the Braxton race in 1966 and the Reed primary effort in 1970.

The same pattern is evident in other races in the November 3, 1970 general election (Government Exhibit 31). Due to the staggered term requirement enacted in 1966, the only Marengo County Commission offices to be contested were the presidency and the Northwest and Southwest district commissioner positions. The Board of Education positions open were the presidency and the Northeast and Southeast district positions. In the race for the presidency of the County Commission Frank

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[3] Witness Eddie Ayers, and NDPA candidate in 1970, testified that the NDPA's primary purpose was to run black candidates for public office. The NDPA adopted the eagle as its emblem and advocated straight ticket voting. This was especially beneficial to illiterate voters who were thereby not required to read the ballot, but rather could simply pull the switch under the eagle. Ayers characterizes the NDPA as an independent political party, and says that its major advantage was that it permitted its candidates to run without paying a qualifying fee. The party was active in Marengo County for about two years, but is no longer active there.

Norris, the white incumbent, defeated R. J. Hayes, the NDPA candidate, by a vote of 5,736 to 3,354, garnering 64% of the votes. Gray Etheridge, the white incumbent, was unopposed in the Southwest District, but in the Northwest District W. T. Glass, the white incumbent, defeated NDPA candidate Henry Haskins by a vote of 5,707 to 3,324, another 64/36 vote. In the race for presidency of the Marengo County Board of Education M. W. McKee, a white, was opposed by NDPA candidate Velma Lankston, whom he defeated by a vote of 5,665 to 3,380, capturing 63% of the vote. In the Board of Education race for member from the Northeast District, T. A. Moseley, the white candidate, defeated NDPA candidate Arthur Wood by a vote of 5,679 to 3,272, another 63/37 count. Finally, in the race for Southeast member of the Board of Education, J. B. Norris, the white candidate, defeated NDPA candidate T. R. Hayes by a vote of 5,673 to 3,397, again a 63/37 vote. In each of these elections the blacks were successful in the same boxes as Cashin and Hayes, and were also unsuccessful in the same boxes. In fact, the returns from most boxes were virtually identical in the different races.[4]

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[4] The following breakdown is gleaned from the election returns of November 3, 1970, as set out in Government's Exhibit 31:

	F. Norris	R. J. Hayes	Glass	Haskins	McKee	Lankston	Moseley	Wood	J. B. Norris	T. R. Hayes
Dayton	37	82	36	81	38	81	35	81	35	82
Demopolis-1	200	169	200	174	196	170	198	167	200	170
Demopolis-4w	734	10	735	10	731	10	729	11	723	14
Lasca	30	3	30	2	30	3	30	3	30	3
Jefferson	99	213	101	229	99	299	98	227	97	231
Linden-3	413	179	413	180	416	179	413	179	413	182
Macon	47	14	47	14	47	14	47	14	47	14
Sardis	50	2	50	2	50	2	50	2	49	2
McKinley	127	77	127	77	126	77	125	77	126	77
Sweetwater	275	170	279	163	275	167	275	161	278	175

This pattern also held true in the 1970 election in the other contested races in Marengo County for Representative to the U.S. Congress, State Board of Education, State Senator, Probate Judge and Sheriff, and in the two state House of Representative races. In the congressional confrontation Walter Flowers, the white incumbent, carried Marengo County, receiving 5,672 votes to 3,272 for NDPA candidate T. Y. Rogers. In the State Board of Education race Victor Poole beat Hood of the NDPA by a count of 5,614 to 3,239. In the State Senate race the white Democratic candidate, W. H. Lindsay, received 5,216 votes to 3,245 for NDPA candidate D. B. Wilson and 562 for Republican candidate E. T. Rolison, Jr. Sammie Daniels won the race for Probate Judge over NDPA's Eddie Ayers by a vote of 5,746 to 3,330. In the Sheriff's race Billy Smith, the white incumbent, won 5,504 to 3,257 over Thomas J. Smith of the NDPA. In the two state house races Pruitt and Manley defeated NDPA candidates Scott and Nixon by votes of 5,540 to 3,069 and 5,600 to 3,372, respectively. The Court notes that the white candidates in each of these elections received between 60% and 65% of the vote, and the box by box returns indicate that black support and white support were centered in the same areas as in the other elections.[5]

11. There were several black candidates in the 1972 general election, none garnering more than 22.2% of the vote and most receiving only 10% to 20%. The two blacks in the 1974 Democratic Primary received almost 35% of the vote, but the blacks in the November 1974 general election all received only 22% to 25% of the vote. The one black candidate in the 1976 Democratic Primary received 41.4% of the vote.

These figures were similar to those in the Wallace-Cashin and Beasley-Hayes confrontations, and, indeed, were followed in every race in which a black faced a white. The figures are set forth only to demonstrate the racial polarity in the voting in these areas and, while they do not include all results, they are indicative of the county-wide vote.

[5] *See* Note 4, *supra.*

12. In the most recent Democratic primary conducted on September 5, 1978, there were three black candidates for county-wide office. Ludie Pearson, a black, challenged two white candidates, John C. Ramsey and Patsy Compton Rogers, for the Democratic nomination to the office of Marengo County Tax Assessor. Ramsey received 3,372 votes to 1,600 for Rogers and 1,556 for Pearson, and Ramsey thus received the nomination without the necessity of a run-off. In the race for President of the County Commission Robert W. Jones, Jr., a black, faced white incumbent Frank Norris and Tommy Ray, another white. A run-off was required when Norris got 3138 votes in the primary to 2186 for Jones and 1341 for Ray. In the run-off, held September 26, 1978, Norris outpolled Jones 4,371 to 2,852 to receive the party's nomination. The final black candidate was Clarence Abernathy, who was opposed by two whites, Charles McCray and Mike Slocum, in the race for Marengo County Coroner. Again, a run-off was required as Abernathy captured 1,183 votes to 2,771 for McCray and 618 for Slocum. Abernathy was successful in the run-off, however, and he became the first black ever elected to county-wide office in Marengo County when he defeated McCray in the run-off 3,719 to 3,617. In the only other run-off in 1978 in which a black faced a white Richard Shelby, the white candidate for U. S. LCongress, outpolled Chris McNair, the black candidate, 3,802 to 2,784 in Marengo County. The Court notes from the box by box returns supplied by the Government (Government's Exhibits 33 & 34) that the polarity in voting observed in the 1970 general election returns is not nearly so pronounced in the 1978 run-off.[6]

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[6] The following breakdown of the same boxes surveyed in the 1970 general election returns indicates that the voting patterns in 1978 have changed somewhat from those in 1970 (the black and white totals are the number by race of persons voting in the run-off as set out by Government Exhibit 39):

13. The foregoing recitation revealing the lack of success in the past on the part of black candidates in Marengo County due to general polarization in black and white voting is not indicative of a lack of access to the political system. The access guideline touches upon whether the political processes are open to minorities, not on whether such minorities are successful once access has been obtained.[7]

	McNair	Shelby	Jones	Norris	Abernathy	McCray	Black	White
Dayton	80	40	90	36	100	26	85	45
Demopolis-1	143	122	190	120	170	133	200	126
Demopolis-4w	147	635	116	769	105	689	-	-
Lasca	4	23	1	30	4	26	-	-
Jefferson	163	74	189	64	175	76	-	-
Linden-3	171	289	129	351	281	237	168	377
Macon	22	23	13	33	18	28	-	-
Sardis	3	41	5	41	9	33	-	-
McKinley	105	47	78	81	126	41	135	46
Sweetwater	94	147	80	206	137	156	124	215

These figures indicate to the Court that while racial polarity may continue to play a role in Marengo County elections, it is now by no means as pervasive an influence as it has been in the past.

[7] This Court does not subscribe to the access theory adopted in *Bolden v. City of Mobile,* 423 F.Supp. 384, 389 (S.D. Ala. 1976), and *Brown v. Moore,* 428 F.Supp. 1123, 1128 (S.D. Ala. 1976), that demonstration of an at-large system that precludes black participation by virtue of racially polarized voting is sufficient to establish a lack of minority access to the political system. While this may have been the rule in *Bolden,* and while the Fifth Circuit may have acquiesced in the finding, *Bolden v. City of Mobile,* 571 F.2d 238, 243 (5th Cir., 1978), it must be remembered that *Bolden* and *Brown* dealt with an electorate that is approximately 65% white and 35% non-white, while the evidence before the Court in the matter *sub judice* indicates that the populace of Marengo County is majority black while the ranks of voters are almost equally split. On this basis, the Court is more cognizant of the Fifth Circuit's language in *Nevett v. Sides,* 571 F.2d 209, 227 (5th Cir. 1978) (Nevett II), where the Court, dealing with an electorate fairly evenly split along racial lines, concluded that "[t]he success or failure of black candidates appears to depend not upon any

14. While the Court concludes that lack of success at the polls is not indicative of any lack of minority access, it is incumbent upon the Court to look further to ensure that the access facially apparent is not actually illusory. In this respect the plaintiffs point to inequalities in the appointment of election officials, bloc voting along racial lines, and present oppression stemming from a history of racial discrimination as causes of an actual lack of minority access to the facially neutral political system in Marengo County. The plaintiffs contend that the amalgamation of these problems has resulted in a lack of realistic access.

15. On the poll official appointment question, the plaintiffs allege that the appointments made by the County Appointing Authority[8] have been racially motivated and tend toward tokenism. They contend that it is important to have black poll officials so that black voters will have more confidence in the electoral system. The evidence before the Court reflects that the assertions of the plaintiffs with respect to appointments are to a large extent true. Sim Essex, Jr., testified that at the Jefferson polling place at which he votes and where 70% of the voters are black there were only two blacks among the eight election officials at the most recent election. Arthur Woods testified that only one of the officials at the polling place in predominately black Faunsdale is black. The Court has not been provided with a box by box breakdown of the number of poll officials by race, but one member of the County Appointing Authority testified

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barriers to access to the slating or registration stages of Fairfield's political process but upon racially polarized voting in an at-large setting and the shifting racial makeup of the voting population." In the similar matter *sub judice* the Court is convinced that the lack of black success in Marengo County elections results not from a lack of access to the political system, but rather from a failure of the blacks to turn out as many of their half of the voters as do the whites.

[8] The appointing authority under Alabama law consists of the County Judge of Probate, Sheriff, and Circuit Court Clerk. *Ala. Code*, § 17-6-1.

that one black was appointed at each polling place for the 1970 election, and there is no evidence that this number has increased to any great extent.

The appointment of poll officials is regulated by state law. Section 17-16-17 of the Alabama Code provides that, for primary elections, the county committee of the political party conducting the election may certify to the County Appointing Authority six persons to act as poll officials in each precinct.[9] This list is presented to the County Appointing Authority which then appoints the poll officials, usually going by the supplied lists. On this basis and under the facts of this case the Court is not particularly surprised that blacks have not received what they considered to be their fair share of appointments. Under the state statutory framework black candidates are allowed to suggest qualified persons to serve in these positions. They have not done so. This puts the burden on the Marengo County Democratic Executive Committee to submit names of proposed officials, and, while there have doubtless been many new appointments made, it is much easier to rely upon prior appointments than to seek out inexperienced but qualified replacements.[10] The Court is concerned that such procedures

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[9] Under the statute, candidates for nomination "may, at least 25 days before the primary, present to the county executive committee of his party a list of election officials desired by him for any one or more of the . . . precincts." *Ala. Code,* § 17-16-17. The evidence before the Court revealed that such lists are rarely forwarded to the county committee; the committee generally makes up its lists from names of previous poll officials and other persons. The plaintiffs contended that black candidate Ludie Pearson's submission of names for the 1978 primary was improperly ignored by the Marengo County Democratic Executive Committee, but the evidence revealed that Pearson's submission was not timely under the statute and was thus not due to be considered. (Government's Exhibits 13 & 14).

[10] The Marengo County Democratic Executive Committee has 34 members, seven of whom are black. The black members have suggested in the past that the Committee submit an equal number of

are inequitable to the extent that they serve to limit participation by blacks in the political process, but the Court is convinced that this inequity is not of such magnitude as to deprive blacks of access to the political process.[11]

16. The second issue raised by the plaintiffs in this action touching upon access is the polarization in white and black voting. This polarization was described in *Bolden*, 423 F.Supp. at 1128, as "white voting for white and black for black if a white is opposed to a black, or if the race is between two white candidates and one candidate is identified with a favorable vote in the black wards, or identified with sponsoring particularized black needs." The Court in *Bolden* noted that "[w]hen this occurs, a white blacklash occurs which usually results in the defeat of the black candidate or the white candidate identified with the blacks." *Id.*

There can be no question but that such polarization exists among white and black voters in Marengo County, although perhaps not quite so seriously today as has been the case in the

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black and white names to the appointing authority, but the Committee Chairman Joseph Camp took the position that they should not be guided by quotas but rather should seek out the most qualified officials. In his testimony Camp admitted that there are blacks in Marengo County who are qualified to serve as poll officials, but he had no explanation for why more had not been appointed.

[11] The obvious reason for concern on this issue is the fact that such officials are of great importance to the illiterate voters of Marengo County. Although under Alabama law an illiterate voter is entitled to have anyone of his choice to aid him in preparing his ballot, *Ala. Code*, § 17-16-27, the evidence before the Court revealed that in most cases it is the election officials who are called upon to render such assistance. The Court can certainly agree that a black illiterate voter would have more confidence in the assistance rendered by another black, as would a white with a white. However, as the Court notes in the text, this issue does not serve to in any way limit access to the political system.

past.[12] However, as the Court noted earlier in this opinion, it is difficult, perhaps impossible, to conceive how such polarization can possibly be found to be an obstacle to black access to the political system in a county in which blacks control close to 50% of the voting strength. Counsel for all parties agreed in open court that there are 16,000 in people in Marengo County who are qualified to vote, 44% of whom are black. While the Court itself doubts this stipulation as to the total number of qualified voters, assuming *arguendo* that blacks do comprise 44% of this voting population, they would control 7,040 votes. The Court has surveyed the election returns provided by the Government for elections conducted between 1966 and 1978 in Marengo County (Government Exhibit 31), and notes that Billy Smith's 7,073 votes in the 1974 Democratic primary is the largest total compiled (he was not opposed by a black), while most winners have generally garnered only 5,000 to 6,000 votes. Therefore, it is clear that if the blacks could overcome voter apathy and turn out their votes, they could succeed in spite of polarization. Accordingly, the Court finds that the polarization in black and white voting is an obstacle to black success at the polls but has little bearing on the access of blacks to the Marengo County political system. *See Nevett v. Sides,* 571 F.2d 209, 227 (5th Cir. 1978) (Nevett II).

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[12] *Compare* Notes 4 & 6, *supra.* The Court's own analysis of the bloc voting issue is perhaps simplistic, since it relies upon a box by box examination and comparison of the votes received by black and white candidates in both predominately black and predominately white areas. The experts for both the plaintiffs and the defendants relied upon regression analysis to indicate the nature and extent of bloc voting. The expert testimony and the experts' scientific analyses of past election returns established only what the Court had determined through its simple comparative analysis - that bloc voting along racial lines has existed since blacks have had the right to vote in Marengo County and, although there is still a great deal of racially motivated voting present, the problem is not so bad now as it previously had been.

17. The plaintiffs' final contention touching upon minority access argues that blacks have been denied access by virtue of oppressive racism on the part of Marengo County public officials, both past and present, and on the part of private individuals. Such oppression, the plaintiffs argue, has taken many forms that, when considered in the aggregate, serve to limit or preclude minority access.

The most vexatious form of oppression cited by the plaintiffs is the alleged intimidation of black voters by whites. Various witnesses testified that they knew of occasions where black sharecroppers had been carried to the polls by white landowners who dictated to them how they were to vote. Despite this testimony, the plaintiffs were unable to produce a single black who had been so intimidated,[13] and the Court can therefore give no credence to the allegations.

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[13] One witness called by the Government, Reatha Pritchett, testified to other forms of oppression allegedly carried on by Marengo County Board of Education Superintendent Fred Ramsey. Pritchett testified that she had seen letters from Ramsey to at least six different Board of Education employees directing them to vote in a certain manner and implying that their jobs might be in jeopardy if they did not follow his instructions. On the basis of this testimony, the Court subpoenaed the six persons to whom the letters were allegedly directed, all of whom unconditionally denied that they had ever received such letters or anything like them. Only three of the six were Marengo County residents. On the basis of this, the Court is convinced that Pritchett's testimony, if not amounting to outright perjury, is at least so lacking in credibility as not to merit the Court's consideration in any respect.

While on the issue of Mrs. Prichett's testimony, the Court would like to take this opportunity to condemn the efforts of the Government attorneys so that memorialization on the official record may aid in preventing such improper behavior in the future. There can be no question that the decision by the United States Attorneys involved in this case to put Mrs. Pritchett on the stand bordered on incompetence, since the veracity of her statements could have been easily checked prior to trial. This, however, is not an extremely unusual practice among attorneys and would not have drawn the Court's wrath had they subsequently acted professionally with respect to the matter. They did not. The Court subpoenaed the six persons allegedly receiv-

Another form of alleged oppression leading to lack of access has been the conduct of the Marengo County Board of Registrars, before whom all persons must appear in order to be certified as qualified to vote. The first issue raised concerned the hours the Board is open, with one witness complaining that the brevity of the registration hours serves to discriminate against blacks. The testimony revealed that the Board generally is open from 9:00 a.m. to 4:00 p.m. on the first and third Monday of each month, and that the Board had been open every day from July 1978 to the time of the elections because it was an election year. Christine Spidle, a member of the Board, testified that the Board has never received a request that they stay open for longer or for different hours. The Court fails to see how such a policy in any way discriminates either against blacks or in favor of whites. A second complaint registered against the Board of Registrars is that it meets only in Linden, the county seat, which is often inconvenient to rural residents who wish to register. Mrs. Spidle testified that the Board once convened in Demopolis, but that this was the only time that the Board has met outside of Linden. Such intransigence was contrary to state law, since Section 17-4-1 of the *Alabama Code*, before its repeal, required the registrars to visit each precinct in the County at least once every two years, with proper notice preceding

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ing the missives from Ramsey and ordered them to appear in Court at 8:30 a.m. on October 25, 1978. The Court's witnesses all appeared in accordance with the terms of the subpoenas and were in the hall outside the courtroom at the appointed time, although Court was not to commence until 9:00 a.m. Without permission of the Court, and without even communicating their intent to the Court, the United States Attorneys took the Court's witnesses into their office, along with Mrs. Pritchett. The Court has no knowledge of what transpired therein, but the entire episode reeks of impropriety and disregard for ethical behavior. Such conduct is especially of concern to the court in consideration of the fact that these attorneys are representatives of the United States Government. See Note 21 *infra* for further observations by the Court on the conduct of these attorneys.

their appearance. The Court does not find the failure to comply with the statute necessarily discriminatory toward blacks, since all rural residents were inconvenienced by the failure. The Court does note, however, that more blacks than whites were so inconvenienced. The final complaint against the Board of Registrars is its failure to appoint deputy registrars to aid the Board in registering voters, which the Board is empowered to do under Section 17-4-158 of the *Alabama Code*. Earnest Palmer, a black, testified that he volunteered his services to the Board in this capacity (Government Exhibit 1), but the Board never acted upon this. Of course, such a decision is discretionary with the Board, and so long as the Board is not discriminating on a racial basis in terms of its policies, the Court is not constrained to find any misfeasance in the Board's failure to affirmatively act to facilitate the registration process to any greater extent than it already is available. However, since the Board of Registrars is duty bound to register all the voters in Margento County that are qualified to vote, the Court would think that any program by which their job was made easier, such as the appointment of deputy registrars, would deserve serious consideration.

The final area of alleged oppression that the plaintiffs contend amounts to a lack of minority access or evidence thereof is denial of access to the ballot. The evidence reveals that on only one occasion has a black been denied a position on a ballot, and the Court is of the opinion from the evidence presented that there was no racial motivation underlying the denial of that ballot position. On July 5, 1978 J. H. Davis, a black, appeared in the office of Joe Camp, the Chairman of the Marengo County Commissioner representing the Northeast District. Camp provided Davis with the qualifying papers, which Davis filled out (Government Exhibit 7). Davis then informed Camp that he was a pauper and that he would like to get an exemption from paying the qualifying fee. Camp prepared a pauper's oath which Davis swore to and signed (Government Exhibit 7A), and both parties thought that Davis was thereby fully qualified to run. However, Camp was unfamiliar with the Democratic Par-

ty rules regarding fee waivers, and it was not until later on the same day that he learned from the State Committee that an application for a fee waiver must be accompanied by a petition signed by ¼ of 1% of the registered voters in the county.[14] After learning of this, Camp wrote to Davis and informed him of the petition requirement, and explained that since the filing deadline was July 7, 1978, he would have to refile in accordance with the petition requirements very quickly if he wanted to be on the ballot (Government Exhibit 11). Davis did not refile and thus his name did not appear on the ballot. He testified that he never received Camp's letter, but whether he did nor not it is clear to the Court that the denial of access to the ballot resulted not from any racial motivation but rather from the County Chairman's unfamiliarity with the rules of his party.

18 None of the foregoing collateral issues touching upon minority access persuade the Court that Marengo County blacks have been denied access to the political system. The evidence is clear that any qualified elector may seek political office in Marengo County, and that neither *de jure* nor *de facto* impediments serve to restrict this right.

B. Responsiveness of Elected Officials to the Black Populace of Marengo County.

19. In *Hendrix, supra,* the Fifth Circuit characterized the District Court's inquiry in this area as follows:

> The analysis of the responsiveness question requires a consideration of two distinct problems. The first is the provision of governmental services to minority communities. This is the area in which citizens must typically rely on their local government for equal treatment.

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[14] Article VII, § 6(c) of the Rules of the Democratic Party as adopted by the State Democratic Executive committee on January 31, 1970 (Government Exhibit 12).

> The second problem faced in making the responsiveness analysis "concerns the distribution of [county] jobs and appointments to various boards and commissions."

Hendrix v. Joseph, supra at 1268-69, *quoting in part Davis v. Garrison, supra* at 929. Accordingly, it is this Court's duty in this area to enter its findings in these two specific areas, together with any other findings bearing upon responsiveness of elected officials.

20. With respect to the provision of governmental services to minority communities, the plaintiffs rely heavily on evidence reflecting poor roads in some predominately black areas to support their contention that the Marengo County Commission has been unresponsive to black needs.

In Marengo County, each county commissioner has the responsibility for maintaining the county roads in the district from which he is elected. The roads are under a district system under which each commissioner has his own road crew and equipment, and each commissioner is responsible for the hiring of his crew. Thus there are four separate county road crews in Marengo County, as opposed to the one centrally located road crew found in other counties that operate under the unit system.

There are 675.6 miles of road in Marengo County, of which 317.7 miles are paved and 357.9 miles are unpaved.[15] Maintenance of the paved roads is handled by the County Engineer, while the commissioners have the responsibility for the upkeep of the unpaved roads.

21. The evidence of the plaintiffs respecting Marengo County roads indicated that the roads in most predominately black areas are unpaved, and that such roads are often in terrible con-

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[15] These mileage figures are derived from testimony by Marengo County Engineer Hollis Glass. According to Glass, the figures include all public roads, but they do not include city streets.

dition during and after adverse weather conditions. There was testimony with specific respect to three unpaved roads in the county that allegedly demonstrate the conditions throughout the county.

First in the predominately black Old Spring Hill area there is an unpaved road that, according to the testimony of one witness, if completed would cut 10 to 15 miles off of the trip from Old Spring Hill to Demopolis. This witness, Eddie Ayers, testified that he has tried unsuccessfully for the past eight years to get the County Commission to rebuild the road,[16] and another witness, Irnetta Murdoch, testified that she too has been unsuccessful in her attempts to get the road repaired or rebuilt.[17] Both of these witnesses testified that during bad weather the road becomes almost impassable, but they conceded that the road is usable under normal conditions.

A second specific road problem revealed by the evidence concerned an unpaved road in the Southeast district that goes from Flatwood on Highway 5 to Highway 28, another predominately black area. A store proprietor on this road testified that prior to recent repairs by the county the road was in very bad shape, although it appears to the Court that the road was impassable only under the worst of conditions. The witness, Flora Moore, testifed that two years passed between the time she initially com-

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[16] Ayers testified that a county work crew once commenced work on the road, but they stopped shortly thereafter and no work is now going on on the road.

[17] The Court is not certain that the commissioner's refusal to respond to Murdoch's request had anything to do with her race. Murdoch testified that she complained to her commissioner, Jack Holt, on September 28, 1978, which was shortly after he lost his bid for reelection. He responded that she could forget about getting anything before the new commissioner took office in four months. It appears to the Court more likely that Murdoch was having a brush with lame-duck politics, not racial discrimination.

plained about the road to county employees and the time that the repairs were actually effectuated.[18] The road has now been graveled and is ready for paving if and when the funds are available.

The final road receiving testimony in this case is in the Vineland area of the Southeast District. This road serves four black families in the area and one witness testified that in rainy weather the road becomes impassable, preventing him from leaving the area, and on some occasions preventing the postman from entering the area or negotiating the road.[19] This witness, L. O. Hope, testified that he carried a petition signed by other local residents to his commissioner requesting that the road be blacktopped, but he was told that there were no funds for this.[20]

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[18] The Court notes that Moore never complainted to her commissioner about the road; presumably she expected that her complaint would be passed on to the commissioner by the road crew employees. The commissioner for the Southeast District James Edmonds, testified that the recent repairs to the road were made without request, and that Moore's complaints had not been passed along to him. Edmonds testified that one reason the complaint might not have been passed on to him is that his employees do not have to run for reelection, so they are less likely to exhibit the same concern for complaints as Edmonds does.

[19] Hope's assertions regarding the difficulties of the postal carrier are overstated. Gov. Exhibit 49, consisting of certified copies of rural carrier trip reports filed by the carrier for Hope's area, reveal that between 10-11-75 and 11-3-78 the carrier, J. R. Spinks, has been stuck twice, has been snoed out one, and has on one occasion noted bad roads. This three year record is hardly evidence of impassable roads.

[20] The Minutes of the Marengo County Commission meeting of January 8, 1977 (Gov. Exhibit 26) reflect that Hope appeared before the Commission with his wife and others and presented a petition stating that the community road needed graveling, the bridges needed to be repaired, and that all efforts to get relief from Commissioner James Edmonds had been unsuccessful. The minutes reflect that the Commission agreed after presentation of the petition that the road was to be graveled as soon as weather permitted. The evidence does not reflect when the graveling was done, but the road has been graveled since that meeting.

Later, approximately 75% of the road was graveled, but no repairs have yet been made on a one lane bridge that has caused problems, nor have any repairs been made on another road that residents of the area formerly used as an exit from the area during bad weather. Another resident living on this road, Norman Richardson, cast great doubt on the problems asserted by Hope. Richardson testified that he refused to sign the petition presented by Hope to the Commission, and that, while the road is sometimes flooded by two nearby creeks, he has never been unable to drive on the road, which he drives on twice a day. The sum of the evidence concerning this road convinces the Court only that a single commissioner may have been unresponsive to the people's needs, and that his unresponsiveness was cured by the Commission as a whole when the problem was brought to their attention.[21]

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[21] This is another situation in which the Court is of the opinion that the government attorneys have either breached the duty of their office or misconstrued their own responsiblities. *See* note 13, *supra*. Counsel for the government interviewed both Hope and Richardson concerning this road prior to the trial of this matter, and yet they called only Hope, whose testimony painted a picture of the road substantially different from that revealed by the testimony of Richardson.

Government attorneys from the Department of Justice appear in this Court as agents of the Attorney General of the United States, who is authorized by statute to "conduct and argue any case in a court of the United States in which the United States is interested." Title 28, U.S.C.A., § 518(b). Nowhere in the statutes is the interest of the United States defined, but this Court is firmly convinced that the conduct of the government attorneys in this particular instance is abhorrent to any interest of the United States. The Court recognizes that by virtue of the Voting Rights Act of 1965, the protection of voting rights for all Americans is a particularized interest of the United States, but the interest of the United States is best protected by a full disclosure of the facts surrounding any alleged violation of that interest, not by selective presentation of the evidence indicating only those facts militating towards a violation of the interest. Accordingly, it is not the duty of the government attorneys to "make a case", for that can be left to private counsel. Government counsel has a duty to present all facts uncovered by their investigation, for their victory is justice, not a verdict for one party over another.

22. The evidence reveals that while some of the unpaved roads in the predominately black areas do suffer in inclement weather, the commissioners have maintained the county roads on a nondiscriminatory basis. Road paving and graveling are conducted in both predominately white and predominately black areas. The most serious deficiencies in the unpaved roads appear to result from a combination of bad weather, the highly plastic clay indigenous to Marengo County, and from the use of the roads by the plethora of logging trucks operating within the county. This combination makes it very difficult to keep all roads in optimum condition at all times. The evidence does not reveal any occasion on which the County Commissioners have refused to do road work on the basis of the race of the people who would benefit from such road work, nor does it reveal that complaints regarding roads in predominately white areas were accorded any greater concern than those in predominately black areas.

23. Another issue raised by the plaintiffs concerns work done by the County Commisison on private property at the behest of private property owners and on city streets, two areas in which the county is not specifically authorized to conduct such operations. *See Ala. Code* §§ 11-3-10, 23-1-80, and 23-1-130.[22] The evidence clearly revealed that on various occasions different commissioners have paved church parking lots, engaged in repair work on private property, and paved some city streets. The evidence, however, does not indicate any discriminatory basis on which such work was conducted, since the work was

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[22] The plaintiffs appeared to contend at trial that such unauthorized labor is a criminal violation. The Court has not been able to find any statute specifically prohibiting this, nor have the plaintiffs directed the Court's attention to such a statute.

done for both black and white citizens.[23] The Commissioners testified that they have always done such work, generally working on the requested projects when the equipment is in the area.

24. Perhaps most telling on the issue of responsiveness is the evidence put on by the defendants. The testimony revealed several areas in which the Marengo County Commission has acted voluntarily that have resulted in benefits of disproportionately more value to the black citizenry than to the white people.

The Marengo County Commission has provided facilities and transportation for an elderly nutrition program established under the auspices of the City of Linden and the Alabama-Tombigbee Regional Planning Council (Government Exhibit 8). The evidence reflects that more whites than blacks were served by this program; indeed, the program was on one occasion made the subject of charges of racial discrimination (Government Exhibits 3-6). However, it appears from the record that the discriminatory activities, if ever present, are no longer present, and that the program is now open to all elderly citizens of the county. At no time did the Marengo County Commission have any authority over who participated in the program.

A second service receiving County Commission support is the West Alabama Mental Health Center. The Mental Health Center offers a variety of services, including emergency and in-

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[23] Testimony of Frank Norris, President of the Marengo County Commission, revealed that paving or other work is done in a city or town only after receipt of a request by the Mayor of that city or town.

The plaintiffs placed great emphasis on the fact that the Marengo County Commission had authorized paving work at a private school (Government Exhibit 16). However, the evidenc erevealed that the Commission was paid for the work and that the work was done over a three day holiday weekend resulting in no down time for county equipment. The Court finds no unresponsiveness or discrimination in such conduct.

and out-patient facilities, and the Center has a branch office in Demopolis. Testimony revealed that the racial composition of the Marengo Countians who received services from the Center ran from 65% to 70% black to 30% to 35% white. A former director of the Center, Dr. Michael Mundy, testified that the Marengo County Commission provided $6,000.00 per year to the Center[24] and recently provided on-site construction assistance to the Center during the building of its new facility in Demopolis. Additionally, the County Commission has contracted with the Center to provide a psychologist for the Marengo County jail rehabilitational program which serves a jail population that is approximately 90% black. The evidence further revealed that the National Institute of Corrections has recently named the Marengo County jail as one of seven model correctional psychological programs.

Another area in which the Marengo County Commission has provided funding is the Marengo County Health Department, whose clientele was estimated by its director to be 75% to 80% black. While the Health Department does oversee some federally funded programs, it is nominally controlled by the State Health Department and receives funding and some of its facilities from the County Commission.

The County Commission also provides funding for the operation and maintenance of the Marengo County Public Library. The library, which is located in Linden, is open to all county residents, and in addition to books it has a film program, large print books, materials for the handicapped, a bookmobile, and it serves both private and public school students. The county funding for the library is used for the purchase of books, for funding of the library bookmobile, for payment of utilities, and for payment of the librarian's salary. The county librarian, Alyce Hartzelle, testified that the library's facilities are utilized

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[24] The Center was also funded by state and federal funding.

by substantial numbers of both black and white county residents, but she could not estimate the percentage of the racial composition.

Another service made available to county residents through funding by the County Commission is paramedic and emergency rescue facilities. There are two rescue squads - the Marengo County Rescue Squad, Inc., and the South Marengo Rescue Squad. The first group has 35 white members,[25] while the second group is integrated with 26 blacks and 39 whites. The squads provide paramedic, fire, and recovery-rescue services to all county residents, regardless of race. Both of the organizations are volunteer units. The County Commission has provided funding for various pieces of equipment, and testimony revealed that the Commission has been receptive and responsive to other requests by the squads. There is no charge for the services provided by these squads.

The evidence revealed that the Marengo County Commission has provided many other services to county citizens too numerous for listing here, most of which were equally beneficial to blacks and whites and some of which were more beneficial to blacks.[26]

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[25] The testimony revealed that the group has no restriction against black mambers, only that no blacks had ever applied.

[26] Among other programs receiving funding or other support from the Marengo County Commission are a recreation facility at Myrtlewood, the Demopolis Airport, a county-wide solid waste program, the South Marengo Water and Fire Prevention System, CETA, housing for county Board of Education, FHA, Forestry Service, Soil Conservation, VA, and Department of Pensions and Security offices, and site preparation work for industry and public schools.

25. Very little evidence was put on regarding responsiveness of the defendant Board of Education, but very little was required since this Court takes judicial notice of the long and tortured history of the on-going federal litigation involving the Board, most recently summarized in *Lee v. Marengo County Board of Education,* 454 F.Supp. 918, 919-21 (S.D. Ala. 1978). Solomon Seay, counsel for the plaintiff class in *Lee,* testified that he had more problems in seeking to achieve a unitary system in Marengo County than in any other system involved in the statewide litigation. He attributes this problem to the County Board's insensitivity to the needs of blacks, stating that his experience with the Marengo County Board of Education has led him to believe that they strive not to protect the interests of all people, but rather to make the system palatable to whites. Seay also alleges that facilities at predominately black schools are inferior to those at predominately white schools, but this was not substantiated by any other evidence, nor was it apparent to the Court on the Court's last inspection of these facilities. Seay admits that the Department of Justice intervened in the suit several years ago, and that the Department has played the leading role in the litigation since 1971.

Superintendent Fred Ramsey testified that the County Board has been more responsive to the needs of blacks than those of whites, which would seem proper in a system that is 80% black. 90% of allocated construction money has been spent on predominately black schools and Ramsey opined that all school children are being afforded equal educational opportunity. The record reflects that the Marengo County Board of Education sponsors some federally funded programs aimed at minorities and indigents such as Title I, but it is clear that the Board has not been nearly as dedicated towards seeking such funding as have some neighboring boards, such as that in Greene County.

The Court has had extensive experience with the Marengo County Board of Education and, if as the government contends the present system stands as evidence of official unrespon-

siveness to the needs of the blacks, then it is possible that such unresponsiveness lies in this Court, not with the Board. The Court cannot subscribe to this theory, however, for there is absolutely no evidence either in this case or in *Lee* that the educational needs of blacks have not been protected. Seay testified that he has received letters from blacks complaining about the system, but the Court has not received such letters and a survey of the *Lee* file does not disclose that they were ever brought to either this Court's attention or that of the School Board. At the minimum it would seem that allegations of unresponsiveness would require articulation of something requiring a response.

The Court's observation is that the major difficulties relating to the Marengo County School System are the intractible attitudes of the Superintendent and the Department of Justice lawyers. Counsel in the matter *sub judice* imply that the Marengo County Board of Education's failure to accede to the proposals of the government attorneys in the *Lee* case indicates unresponsiveness to black needs, apparently on the basis that the Department is representing the interests of Marengo County blacks. The Court's experience is that such attorneys do not, as they should not, represent black interests, but rather the interest of the United States Government, which has adopted a facially neutral desegregation policy that in many respects receives no greater support in the black community than it does in the white community. Accordingly, while the Court does agree with Seay to some extent insofar as the main objective of the County Board appears to the Court to be to make the system as palatable to whites, the Court does not feel that any unresponsiveness to black needs has had a serious impact on equal educational opportunities in Marengo County. The Court notes further in this regard that the Marengo County Board of Education has had a black member since 1976 and that his presence on the Board has not resulted in substantial changes in the Board's operation of the schools, although it is not likely that one man can swing great weight on a five member board.

26. The Court elects not to enter any specific findings with respect to the system in general, these matters having previously been set forth in *Lee v. Marengo County Board of Education, supra.* The Court notes only that the Board has provided school children in the county equal educational opportunities through the adoption of a unitary system, that the achievement of such a system was achieved only after extensive litigation, and that had blacks possessed adequate input in the system, it probably would not have taken so long to achieve.

27. The second area for the Court's attention on the responsiveness issue is the distribution of jobs and appointments to various boards and commissions. This is of course an important consideration for such distribution and appointments are among the major functions of local government.

28. The Equal Employment Opportunity Commission State and Local Government Information Reports [hereinafter EEO-4], filed by Marengo County for the year 1974 (Government Exhibit 24) reveals the following breakdown of county employees:

	Total Employees	**Black**	**White**
Officials/Administration	6	0	6
Professionals	2	1	1
Technicians	3	0	3
Protective Services	5	1	4
Para-Professionals	2	0	2
Office/Clerical	2	1	1
Skilled Craft	24	0	24
Service/Maintenance	35	17	18
	79	20	59

One of the two highest paid employees was a black professional, and there was little disparity between the amounts paid to blacks and whites in the same job category, but the Court notes that blacks comprised only 25.3% of the labor pool in a

county that is 50% black and that the service/maintenance category, in which most blacks were employed, was one of the lowest paying categories.[27]

29. The EEO-4 reports for 1976 in Marengo County reflect the following breakdown by race:

	Total Employees	Black	White
Officials/Administration	1	0	1
Professionals	4	0	4
Technicians	1	0	1
Protective Services	3	1	2
Para-Professionals	7	0	7
Office/Clerical	4	0	4
Skilled Craft	25	8	17
Service/Maintenance	26	13	13
	71	22	49

The highest paid employees in 1976 were all white and, although the percentage of blacks increased, it was still short of the county-wide percentage and blacks still seemed tied to the lower paying jobs.[28]

30. There was very little evidence put on respecting appointments made by the Marengo County Commission to various boards and commissions within the county. The evidence did disclose that the Marengo County Library Board has no black

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[27] Government Exhibit 25 reflects that 90% of the black employees made between $4,000.00 and $6,000.00 a year. The white employees were more successful, with 49.4% receiving $4,000.00 to $6,000.00 a year and 40.5% receiving $6,000.00 to $8,000.00 per year.

[28] Government Exhibit 25 reflects that 36.36% of the black employees were still in the $4,000.00 to $6,000.00 range in 1976, while the biggest group, 56.1%, was in the $6,000.00 to $8,000.00 range.

members and that the five member Marengo County Water Board has only one black member. Additionally, the evidence revealed that there are two blacks among the nine members of the Marengo County subcommittee of the Alabama-Tombigbee Regional Planning Commission.

31. The parties put on no evidence with respect to the employment or appointment policies of the Marengo County Board of education, but the Court can resort to figures submitted in the *Lee* litigation to some extent. The reports submitted by the Board in *Lee* indicate that the system wide faculty ratio was 70% black to 30% white in March of 1977, and that this ratio has existed for some time. *See Lee v. Marengo County Board of Education, supra* at 929-30. Of course the Court has no way of knowing whether there is any disparity in pay between black and white teachers, but from the evidence available to the Court it appears that the employment practices of the School Board are free from any racial animus.[29]

32. The assignment of faculty is somewhat more clear than the hiring issue. This Court has strived long and hard to achieve compliance by the School Board with the dictates of *Singleton v. Jackson Municipal Separate School District,* 419 F.2d 1211 (5th Cir. 1970), and such compliance was not actually obtained until the present school year. This indicates an unresponsiveness on the part of the Board to the dictates of the law, but the Court doubts that such unresponsiveness was injurious to black needs in particular.[30]

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[29] The Court has no information regarding the hiring of school staff other than teachers, but the Court notes that all questions in the *Lee* case touching on faculty and staff have been tied to assignment, as opposed to hiring, practices.

[30] This failure to comply, the Court believes, can be attributed to the failure of the School Board to take an active stance to ensure that the law is carried out. Testimony of Moses Lofton, the black School

C. State Policy

33. The *Hendrix* decision is also instructive with respect to this Court's duty to consider whether there is a state policy indicating a preference for at-large districts:

> Although motive is not a direct issue in the dilution context, this factor is used by the courts to determine how skeptically a given at-large system should be regarded. In our federal systems states can choose those techniques of electing officials which suit their local requirements. The adoption of an at-large scheme in a state which has not often used such a mechanism casts the scheme in a dubious light and indicates that it may be a tool of minority vote dilution.

Hendrix v. Joseph, supra at 1269. The task for the Court clearly is to look behind the face of the election scheme to ascertain the motivation of the legislature in enacting the scheme. This Court has already stated that "[t]here is no clear cut state policy either for or against multi-member districting or at-large elections in the State of Alabama, considered as a whole. The lack of State policy therefore must be considered as a neutral factor." *Bolden v. City of Mobile, supra,* 423 F.Supp. at 393.

With respect to the state policy specifically regarding Marengo County, the Court finds that the County Commission form of government was first authorized in 1923. *See 1923 Local Acts of Alabama,* No. 311, at 188. Although known at that time and until recently as the Marengo County Board of

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Board member, revealed that the Board relied upon the superintendent to carry out the orders of this Court and that the Board rarely interfered with his work. It is clear to the Court that Superintendent Ramsey was not aware of the precise impact of the *Singleton* decision prior to a recent hearing in the *Lee* case, and the Court is of the opinion that greater Board assistance and oversight would be proper.

Revenue, it has clearly been a commission form of government at all times. The Act provides for the election of all commissioners by at-large balloting, and a later amendment authorized the staggering of the four year terms. *1966 Acts of Alabama,* No. 44, at 67. Similarly, the Marengo County Board of Education president and member elections have been at-large since 1935, *see 1935 Local Acts of Alabama,* No. 183, at 106, and these terms were also staggered by a 1966 amendment. *1966 Acts of Alabama,* No. 44, at 67.

34. It cannot be said that the at-large scheme isunusual in the context of election procedures in other Alabama counties, since previous cases have recognized that half of the Alabama counties have at-large elections, *see Hendrix v. Joseph, supra* at 1269-70; *Reese v. Dallas County,* 505 F.2d 879, 882 n.2 (5th Cir. 1974), and it appears that presently 50 of the 67 counties have at-large procedures. Defendants' post-trial brief at 44, 60-79. Indeed, the defendants' calculations indicate that 47 Alabama counties (70.1%) have had at-large procedures for a majority of the time since 1850. Such at-large procedures are specifically permitted by statute. *Ala. Code* 11-3-1. So it is quite clear that the Marengo County election procedures are in no way rare or unique in comparison to other Alabama counties, but rather are exemplary of the typical policy followed in most counties. The Court, however, is not convinced that such evidence indicates a state policy in favor of the Marengo County procedure, the Court rather being of the opinion that, as in *Bolden, supra,* the state policy is neutral. *See, e.g., Kirksey v. City of Jackson,* 461 F.Supp. 1282, 1291 (S.D. Miss. 1978) ("[T]here is lacking herein sufficient interest in at-large districting of city government.").

Tangentically, the Court notes that since the election procedures in question were enacted in 1923 and 1935 when blacks had been effectively disenfranchised, there can be no allegation that the at-large schemes were racially motivated in their enactment. *Hendrix v. Joseph, supra* at 1270, *citing McGill v. Gadsden County Commission,* 535 F.2d 277 (5th Cir. 1976).

D. Past Discrimination

35. The final primary consideration of the Court in a dilution case is the nature and the extent of past discrimination in the subject area, together with an inquiry into whether such past discrimination precludes effective present participation in political affairs. The concern is whether the lingering effects of such discrimination interfere with present rights:

> [T]he issue here of course is not whether Rapides Parish discriminated against blacks in the past, but rather whether any debilitating effects of that discrimination still persist . . . . In previous cases such debilitating effects have usually been shown by a relatively large discrepancy between the size of the black population and the number of registered black voters . . .

Bradas v. Rapides Parish Police Jury, 508 F.2d 1109, 1112 (5th Cir. 1975), *quoted in Hendrix, supra* at 1270. Although this precise measurement is unavailable in the matter *sub judice* due to the lack of evidence regarding either the number of blacks eligible to vote or the number of blacks actually registered, there is extensive evidence of past discrimination and some evidence of lingering effects.

36. There can be no question by that blacks in Alabama in general and in Marengo County in particular suffered greatly in the past from racial discrimination, both subtle and pervasive. Prior to the passage of the Voting Rights Act in 1965 there was little or no black participation in political affairs in the State of Alabama, blacks having been for the most part disenfranchised. This was equally true in Marengo County. As noted in *Brown v. Moore,* 428 F.Supp. 1123, 1131 (S.D. Ala. 1976), the disenfranchisement was in large part attributable to the 1901 Constitutional Convention, which was called to effect such disenfranchisement among other things. Prior to the Voting Rights Act's implementation in 1965 some gains had been made, most, if not all, through litigation in the federal courts. Literacy tests,

which had served as a tool to discriminate against black voting applicants, were invalidated in 1949. *Davis v. Schnell,* 81 F.Supp. 872 (S.D. Ala. 1949). Racial gerrymandering of districts for elections was outlawed on two separate occasions. *Gomillion v. Lightfoot,* 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960); *Sims v. Baggett,* 247 F.Supp. 96 (M.D. Ala. 1965). Following passage of the Act the courts were called upon to compel the placing of black candidates' names on the ballot, *Hadnott v. Amos,* 394 U.S. 358, 89 S.Ct. 1101, 22 L.Ed.2d 336 (1969), to compel the Democratic Executive Committees of three counties (including Marengo) to permit federal observers to be present during the casting of ballots, *United States v. Greene County Democratic Executive Committee,* 254 F.Supp. 543 (N. & S.D. ala. 1966), to invalidate the state-imposed poll tax, *United States v. Alabama,* 252 F.Supp. 95 (M.D. ala. 1966), and to invalidate party primary filing fees. *Harper v. Vance,* 342 F.Supp. 136 (N.D. Ala. 1972). There have been numerous other cases unrelated to voting rights in which Alabama blacks have been compelled to seek recourse in the federal courts to protect their constitutional rights, such as employment and housing discrimination matters and criminal proceedings.

37. With specific reference to Marengo County, the statewide litigations mentioned above were, for the most part, equally applicable on the local level. The federal courts have been called upon to rid Marengo County of systematic exclusion of blacks from grand and petit jury venires, *Black v. Curb,* 422 F.2d 656 (5th Cir. 1970), to enforce the rights of blacks under the Voting Rights Act of 1965, *United States v. Marengo County Democratic Executive Committee,* Civil Action No. 4086-66 (S.D. Ala.); *United States v. Marengo County,* Civil Action No. 1567 (S.D. Ala.), and to eliminate the segregated school system that formerly existed in Marengo County. *See e.g., Lee v. Marengo County Board of Education,* 588 F.2d 1134 (5th Cir. 1979); *Lee v. Macon County Board of Education,* 465 F.2d 369 (5th Cir. 1972) (Marengo County System); *Lee v. Marengo*

County Board of Education, 454 F.Supp. 918 (S.D. Ala. 1978); *Lee v. Linden City School System,* Civil Action No. 5945-70-H (S.D. Ala., July 13, 1978). The changes came slowly and were accepted with great reluctance by the white population, but the Court is of the opinion that most, if not all, vestiges of past official discrimination in Marengo County have been eradicated.[31]

38. It is clear that racial discrimination in the past was pervasive in Marengo County, but the more narrow issue for the Court's consideration is whether such past discrimination has in any way precluded effective present participation by blacks in Marengo County political affairs. The plaintiffs adduced very little evidence on this point. They first point out that blacks comprise a majority of the population in Marengo County but a minority of the registered voters, apparently seeking to come within the language of *Bradas, supra.* As noted above, however, it is not a comparison between the percentage of the population and the percentage of the registered voters that is controlling, but rather the comparison between the percentage of the eligible black voters and the percentage of the registered

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[31] The Court does not now find, nor is it ever likely to find at any time in the near future, that all racial discrimination has disappeared in Marengo County. This would be true, of course, anywhere in the country. Man is by nature discriminatory in his actions, and it must be termed unfortunate that the cause of history has led to people making discriminatory choices on a racial basis. The fact that individual racism persists in Marengo County among both blacks and whites is of no moment to this litigation, however, for the Constitution speaks not to the manner in which individuals are treated by others, but rather to the manner in which individuals are treated by government. In saying this, the Court does not lose sight of the fact that much of the private discrimination or racism now existing is attributable to the past history of official discrimination. It is likely that the law can change men's ways but not their minds.

black voters.[32] Another alleged lingering effect is the alleged intimidation of black voters by white employees and landowners. This issue was described above in connection with the access issue, and the Court found absolutely no evidence that the assertions were true, finding rather that the assertions themselves and the testimony surrounding them appeared to be fabricated for use in this case. A final argument advanced on this point was made by one witness who described past discrimination as a "force" that effectively served to limit black participation. It is of course very difficult, probably impossible, for a white fact-finder to fully grasp the essence of this alleged "force," but the Court does not question the sincerity of the witness. However, while the witness' assertion may have been a good faith estimation of his perception of the present effect of past discrimination, the Court is bound to predicate its decision on articulable facts and this witness was not able to describe any such facts.

39. The Court is more persuaded on this point by the number of black candidates (73) and the efforts of black interest groups since implementation of the Voting Rights Act. The evidence surely does not indicate that any blacks have been dissuaded by past discrimination from testing the political waters, nor does it appear that history has served to quiet their collective and individual political voices.

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[32] *See Bradas, supra* at 1112. Many factors could explain the difference between the percentage of the population and the percentage of the registered voters. Two are revealed by the evidence in this case: First, 1970 Census figures reveal that the voting age population is much closer to being evenly split along racial lines than is the population as a whole; and, second, 90% of the inmates at the Marengo County Jail are black and, under Alabama law, convicted felons relinquish their right to vote. Of course these inmates would have no great bearing on the figures, but this is exemplary of reasons other than discrimination affecting the number of black voters. In any event, there may still be some question with respect to the precise comparison that is appropriate under the Fifth Circuit's holdings. *Compare Bradas, supra* at 1112 with *Zimmer, supra* at 1306.

E. Enhancing Factors

The last issues for the Court's concern are the enhancing factors of whether there is a majority vote requirement, whether districts are extremely large, whether there is an anti-single shot provision, and whether there is a provision allowing at-large candidates to run from a particular geographical sub-district. *Zimmer, supra* at 1305.

Marengo County candidates do face majority vote requirements in primary elections, and run-offs are often required when there are three or more candidates for a party's nomination to a particular office and none receives a majority. However, there is no majority vote requirement in the general elections—the candidate who receives the plurality of the votes being declared the winner. On the basis that the Democratic Party primary is for all intents and purposes *the election* in Alabama, the Court finds that the majority vote requirement tends to enhance a finding of dilution.

With respect to the size of the district, the Court finds that Marengo County is a small voting district in terms of population, and that this factor militates in favor of the defendants. There are 23,000 Marengo County residents, while the average county governing district has a population of 47,848. *Hendrix v. McKinney,* 460 F.Supp. 626, 636 (M.D. Ala. 1978). Although this appears to be the test set out by the Fifth Circuit in *Hendrix v. Joseph,* 559 F.2d 1265, 1270 (5th Cir. 1978), there is a geographical consideration that militates against the defendants. Marengo County is the tenth largest in area of the 67 counties in Alabama, and it is for the most part extremely rural. Two incumbent commissioners testified that their most recent campaigns cost between 12,000.00 and $4,000.00. In a county in which the per capita income of whites greatly exceeds that of blacks, the geographical size of the district must be considered as an enhancement of dilution, at least on the question of access.

There is no anti-single shot voting provision in Marengo County, but since candidates run for specific positions the Court is of the opinion that this is a neutral factor.

There is provision for at-large candidates running from specific geographical subdistricts by virtue of the residency requirements for County Commission and Board of Education elections. The Court finds that this factor militates in favor of the defendants.

Conclusions of Law

I. Authority of the Attorney General to Participate

There is a threshold jurisdictional question that, due to the short period of time between the filing of the complaint and the trial of the enforcement action, has not yet been considered by the Court. In plain terms, the jurisdictional question arises out of a dispute with respect to whether the Attorney General of the United States has authority to prosecute a voting rights action alleging dilution or cancellation of black voting strength. The defendants characterize the issue as one of standing, while the government argues that only the jurisdiction of the Court is involved. No matter what characterization is given to the issue, the Court's analysis is the same, for the ultimate inquiry is whether the government is authorized to prosecute an action of this nature.

In its complaint, the government alleges that the action is brought under authority of Title 42, U.S.C.A., §§ 1971(a), 1971(c), 1973, and 1973j(d), and the Fourteenth and Fifteenth Amendments to the United States Constitution, invoking the jurisdiction of this Court under Title 28, U.S.C.A., § 1345 and Title 42, U.S.C.A., §§ 1971(d) & 1973j(f).

The Court's analysis must start with the observation that this precise issue has never been resolved in any federal court. There is no question but that the United States is authorized to initiate

lawsuits to ensure those voting rights protected under Title 42, U.S.C.A., § 1971. *United States v. Mississippi,* 380 U.S. 128, 85 S.Ct. 808, 13 L.Ed.2d 717 (1965); *United States v. Democratic Executive Committee of Barbour County,* 288 F.Supp. 943 (M.D. ala. 1968); *United States v. Bibb County Democratic Executive Committee,* 222 F.Supp. 493 (M.D. Ga. 1962); *United States v. Raines,* 189 F.Supp. 121 (M.D. Ga. 1960). None of these decisions is particularly helpful to the Court in the matter *sub judice,* however, since three of the cases dealt with clear segregative practices prohibited under the statute, and *Barbour County* dealt with quantitative dilution, in the nature of one-man one-vote, instead of qualitative, as now confronts this Court. There have been other enforcement actions brought by the Attorney General to challenge at-large voting systems as dilutive of black voting strength, but apparently none of these cases have considered the authority of the government to participate in and prosecute such actions. *See United States v. Board of Supervisors of Forrest County,* 571 F.2d 951 (5th Cir. 1978); *United States v. City of albany,* 399 F.Supp. 459 (M.D. Ga. 1975); *United States v. City Commission of Texas City,* Civil Action No. G-77-78 (S.D. Texas 1978); *United States v. Temple Independent School District,* Civil Action No. W-78-CA-10 (W.D. Texas 1978). It is clear, therefore, that this is a question of first impression for this Court.

Section 1971(a)(1) provides that:

> All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subsivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude . . . .

Section 1971(a)(2) prohibits the application of differing standards to different applicants in determining voter qualifications, prohibits the denial of the right to vote for non-material

errors or omissions on the voting records, and prohibits the use of literacy tests as a precondition to voting rights unless such tests are administered in writing and the test results are presented to the applicant after the test. For the purposes of section 1971(a), the term "vote" is defined as including "all action necessary to make a vote effective including, but not limited to, registration or other action required by state law prerequisite to voting, casting a ballot, and having such ballot counted and included in the appropriate totals of votes cast with respect to candidates for public office . . ." Title 42, U.S.C.A., § 1971(e).

The Attorney General of the United States is authorized to prosecute a voting rights action for injunctive relief whenever any person has engaged in or there is reasonable cause to believe that any person is about to engage in any act in violation of section 1971(a). Title 42, U.S.C.A., § 1971(c). Jurisdiction is conferred on the United States District Court to hear such actions by section 1971(d).

The Court has exhaustively considered the language of section 1971 and the legislative history behind the adoption of the statute, 1957 *U.S. Code Congressional and Administrative News* 1966, and the Court is of the opinion that the complaint filed by the United States in this action fails to state an actionable claim under section 1971. The Court reaches this decision upon the conclusion that section 1971 was not intended by Congress to extend as far as the government would extend it in this case. The Court views this section as a statutory embodiment of the Fifteenth Amendment intended only to preclude denials by persons acting under color of state law of the right to vote to other persons where such denial is based upon race, color, or previous condition of servitude. There is no expression or allegation in the government's complaint from which it might be inferred that the defendants have in any way denied to any person the right to vote on such a basis. The complaint, rather, is directed only toward the weight of the vote actually possessed

by Marengo County residents. Had Congress intended by this section that each person's vote be accorded a racially blind, qualitatively equal effectiveness, then no doubt such intent would have been spelled out more clearly by the statute. Since this intent is not so spelled out, the Court finds no cause of action stated under section 1971.

The government also asserts that its participation is justified by the Voting Rights Act of 1965, Title 42, U.S.C.A., §§ 1973 & 1973j(d). Section 1973 provides that:

> No voting qualification or other prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any state or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

This statute is enforceable by the Attorney General under the terms of Title 42, U.S.C.A., § 1973j(d), which provides that:

> Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 1973 . . . the attorney General may institute for the United States, or in the name of the United States, an action for preventive relief . . . .

An analysis of these statutes and the legislative history surrounding their adoption leads the Court to the conclusion that the complaint of the government in this case does state a cause of action under section 1973. The statute on its face speaks to "qualification or prerequisite to voting, or standard, practice, or procedure" that might be imposed by a state or a political subdivision to deny or abridge the right to vote on the basis of race or color. The Court reads the complaint most favorably in behalf of the government, as it must do on a motion to dismiss, and the Court is convinced that allegations that an at-large voting system serves to dilute or cancel black voting strength, if

proved, would amount to an actionable claim under section 1973 by virtue of the fact that the procedure employed would be guilty of abridging the right to vote on the basis of race or color.

Section 1973, as a portion of the Voting Rights Act of 1965, was "designed primarily to enforce the 15th Amendment to the Constitution of the United States and [was] also designed to enforce the 14th Amendment and article I, section 4." 1965 *U.S. Code Congressional and Administrative News,* 2437, 2439-44. The statute does not define standard, practice, or procedure, nor has it been construed by any of the cases dealing with the statute. The Court, however, is of the opinion that the congressional intent was to abolish all requirements that might preclude blacks or other minorities from voting. In *South Carolina v. Katzenbach,* 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966), the United States Supreme Court, in affirming the constitutionality of the Voting Rights Act of 1965, viewed the Act as aimed toward the elimination of the procedural hurdles imposed upon black voters. The Court described some of the procedural hurdles that had been employed since ratification of the Fifteenth Amendment:

> The course of subsequent Fifteenth Amendment litigation in this Court demonstrated the variety and persistence of these and similar institutions designed to deprive Negroes of the right to vote. Grandfather clauses were invalidated in *Guinn v. United States,* 238 U.S. 437, 59 L.Ed. 1340, 35 S.Ct. 926, LRA 1916A 1124, and *Myers v. Anderson,* 238 U.S. 368, 59 L.Ed. 1349, 35 S.Ct. 932. Procedural hurdles were struck down in *Lane v. Wilson,* 307 U.S. 268, 83 L.Ed. 1281, 59 S.Ct. 872. The white primary was outlawed in *Smith v. Allwright,* 321 U.S. 649, 88 L.Ed. 987, 64 S.Ct. 757, 151 ALR 1110, and *Terry v. Adams,* 345 U.S. 461, 97 L.Ed. 1152, 73 S.Ct. 809. Improper challenges were nullified in *United States v. Thomas,* 362 U.S. 58, 4 L.Ed.2d 535, 80 S.Ct. 612. Racial gerrymandering was forbidden by *Gomillion v. Lightfoot,*

364 U.S. 339, 5 L.Ed.2d 110, 81 S.Ct. 125. Finally, discriminatory application of voting tests was condemned in *Schnell v. Davis,* 336 U.S. 933, 93 L.Ed. 1093, 69 S.Ct. 749; *Alabama v. United States,* 371 U.S. 37, 9 L.Ed.2d 112, 83 S.Ct. 145; and *Louisiana v. United States,* 380 U.S. 145, 13 L.Ed.2d 709, 85 S.Ct. 817.

383 U.S. at 311-12, 15 L.Ed.2d at 777. Had the Supreme Court stopped at this point the Court would conclude from the thrust of the *Katzenbach* language that the type of action brought here is not within the scope of the Voting Rights Act of 1965, for it is clear that the Supreme Court envisioned, in the foregoing language, eradication of all official impediments to black voting rights in the sense that blacks would not be denied the right to vote, without consideration of such subtle matters as dilution or diminution of the weight of the vote actually allowed. However, the *Katzenbach* Court stated further that "[t]he Voting Rights Act of 1965 reflects Congress' firm intention to rid the country of racial discrimination in voting." 383 U.S. at 315, 15 L.Ed.2d at 779. Since the essence of a dilution suit is the allegation that racially discriminatory voting procedures have resulted in dilution or cancellation of a minority's voting strength, this Court is of the opinion that the government's complaint in this action states an actionable claim under section 1973, and that the Attorney General's participation is authorized by section 1973j(d).[33]

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[33] This conclusion is buttressed by the finding in *Katzenbach* that the remedies for voting rights violations prescribed prior to the 1965 Act had been largely ineffective, apparently the Court concluded that the Act was intended to supplant or at least supplement private actions brought under the Fifteenth Amendment. *South Carolina v. Katzenbach,* 383 U.S. 301, 309, 86 S.Ct. 803, 15 L.Ed.2d 769, 775-76 (1966). *See also Allen v. Board of Elections,* 393 U.S. 544, 556 n. 21, 89 S.Ct. 817, 22 L.Ed.2d 1, 12 (1969). Further support is found in the *Allen* decision, *supra,* where the Court emphasized that section 1973 is to be broadly construed where invoked as a jurisdictional vehicle:

The Court has no problems with respect to the claims of the plaintiff class members since such actions have been implicitly, if not explicitly, approved by the Supreme Court in both *Whitcomb v. Chavis,* 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 361 (1973) and *White v. Tegester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973).

III Aggregation of the Dilution Factors

The Court having made specific findings concerning both the primary and secondary indicia of dilution as set forth in *Zimmer* must now determine the ultimate issue of fact—in whose favor does the aggregate of the factors preponderate? The Court includes this finding of ultimate fact in its conclusions of law simply because it is a factual conclusion based upon legal guidelines. In reaching a determination with respect to the aggregate of the factors, the Court's duty is to "examine and weigh the competing facts to determine whether the incidence of those facts probative of intentional discrimination are sufficient to establish such a finding . . ." *Kirksey v. City of Jackson,* 461 F.Supp. 1282, 1311 (S.D. Miss. 1978). Since this is a constitutional challenge there is a preliminary requirement that inten-

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> The legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered state in even a minor way. For example, § 2 (Title 42, U.S.C.A., § 1973) of the Act, as originally drafted, included a prohibition against any "qualification or procedure." During the Senate Hearings on the bill Senator Fong expressed concern that the word procedure was not broad enough to cover various practices that might effectively be employed to deny citizens the right to vote. In response, the Attorney General said he had no objection to expanding the language of the section, as the word "procedure" was intended to be all-inclusive of any type of practice. Indicative of an intention to give the Act the broadest possible scope, Congress expanded the language in the final version of § 2 to include "any voting qualification or prerequisite to voting, or standard, practice, or procedure."

393 U.S. at 566-67, 22 L.Ed.2d at 17-18 (footnote omitted).

tional invidious discrimination be established. *Washington v. Davis,* 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). However, it is clear that such intentional discrimination may be inferred from the existence of particular facts revealed by the aggregation of the *Zimmer* factors.[34] *See Nevett v. Sides,* 571 F.2d 209 (5th Cir. 1978) (Nevett II). In reaching its decision on the aggregation of the factors this Court has kept well in mind that:

> [d]ilution is an elusive concept because it cannot be proven by mathematics alone. It reflects a challenge to the usual election system wherein the candidate of the majority of the voters wins the election. Dilution unconstitutionally abridges or dilutes meaningful participation by a minority by virtue of the fact that a majority of the voters, and the successful governing authority elected by that majority simply ignore the governmental needs of a substantial minority of the voters and remains arrogant and unresponsive to the voting strength of that minority. It constitutes a violation of the Fourteenth and Fifteenth Amendment guarantee that all citizens and classes of citizens be afforded some meaningful participation in the election process, not just the right to cast a vote.

Kirksey v. City of Jackson, 461 F.Supp. 1283, 1311 (S.D. Miss. 1978), *citing Davis v. Garrison,* 553 F.2d 923, 925 (5th Cir. 1977).

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[34] In *Nevett II,* the Fifth Circuit rejected the tort standard of intent that was employed by this Court in *Bolden v. City of Mobile,* 423 F.Supp. 384 (S.D. Ala. 1976) and *Brown v. Moore,* 428 F.Supp. 1123 (S.D. Ala. 1976), and the quasi-impact test employed in *Village of Arlington Heights v. Metropolitan Housing Development Corporation,* 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), relying on an "inference of intent" test that is predicated upon the amalgamation of the factors. *Nevett II,* 517 F.2d 217. The validity of this analysis has been questioned, Note, *Vote Dilution Challenges after Washington v. Davis,* 30 Ala. L. Rev. 396, 415 (1979), and the question has been presented by certiorari to the United States Supreme Court, but this Court is bound to apply the law as it now stands.

Having considered all of the factors relevant in a dilution inquiry, the Court finds the following conclusions to be proper under the evidence presented:

(a) There is absolutely no lack of access for blacks to the political processes in Marengo County. The Court finds no impediments, official or otherwise, to black persons registering to vote, casting their ballots, and having their votes properly tabulated. Nor does the Court find any such impediment to black candidates, since it is clear that black persons as well as whites are equally allowed to seek public office, including filing campaign papers, seeking votes, and having their names placed on the ballot. The fact that there is clear evidence of racially polarized voting does not persuade the Court that there is a lack of access in a district in which blacks control over 40% of the total vote, in which blacks have actively sought public office on various occasions, and in which there is no evidence of racism in the official policies and individual campaign practices in the local elections. It is unfortunate that electors would allow racial bias to override a candidate's qualifications, but the Court is convinced that under the totality of the circumstances in this case a mere showing that there has been polarization of the votes in past elections is not sufficient to establish that there is any lack of access to the political processes for blacks. The only lack of access visible to the Court is the inferential lack deriving from the fact that Marengo County whites exist on a higher socio-economic strata than blacks. *See Kirksey v. Board of Supervisors of Hinds County,* 544 F.2d 139 (5th Cir. 1977).

(b) Nor does the Court find any substantial lack of responsiveness on the part of the governing authorities. While there was some evidence that blacks have been ignored to some extent in the areas of road construction, employment, services, and education, the other evidence establishes that many programs have been initiated that are more favorable to blacks than to whites. The Court is confident that any action taken by any governing authority will have a different effect on one group of

people than it does on another, so the fact that there is some evidence of some unresponsiveness does not persuade the Court that the conduct of that governing authority is to be characterized as unresponsive. As with the access issue, the totality of the evidence in this case simply does not support the allegations of the plaintiffs. The Court is not unaware of the importance of its findings on the responsiveness issue,[35] and most of the time spent on consideration of the findings was on review of the evidence touching on responsiveness. Where, as here, there is evidence of even-handed policy in most respects, with isolated improprieties in most cases involving no racial discrimination, it simply cannot be said that the governing authority is unresponsive. With respect to the Marengo County Board of Education, the plaintiffs established only that that body has been unresponsive to the efforts of the United States Department of Justice, not that they have been unresponsive to the needs of blacks. If the Department of Justice is under the misapprehension that they speak for the majority of the blacks in Marengo County, they certainly failed to establish it by any credible evidence.

(c) The state policy behind the at-large system employed in Marengo County elections is tenuous at best, and deserves only to be treated as a neutral issue. *See Brown v. Moore,* 428 F.Supp. 1123, 1131 (S.D. Ala. 1976); *Bolden v. City of Mobile,* 423 F.Supp. 384, 393 (S.D. Ala. 1976).

(d) The Court finds that lingering effects of past discrimination have played a role in Marengo County elections. There can be no question but that the racism of the past has led to the present racial polarization in voting. And certainly the indignities thrust upon blacks in the past are still well within their minds

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[35] In *Blacks United for Lasting Leadership v. City of Shreveport,* 571 F.2d 248, 254 (5th Cir. 1978), the Court of Appeals noted that "[t]he issue of responsiveness in a case like this is momentous. Its resolution has considerable probative value on the question whether the plan is being purposefully maintained."

when they cast their ballots or consider the pursuit of political office. But the Court's inquiry is whether the past discrimination has present effects, and the Court finds such effects to be limited. First, blacks have suffered from inadequate representation among poll officials, which the Court clearly deems to be a present effect of past discrimination. Second, blacks apparently have some reticence with respect to publicly expressing political opinion, which must be the result of past discrimination since there was no evidence of any present practice that would encourage such attitude. Finally, there is no question but that the past history of racial discrimination has a present adverse effect on blacks seeking change, political or otherwise, for the record is clear that such changes for blacks have always required an inordinate amount of effort. From the totality of the evidence the Court finds that there are present lingering effects of past discrimination among blacks in Marengo County, but that the effects do not manifest themselves so completely in political matters as they do in other everyday affairs.

(e) Among the enhancing factors the Court finds that the majority vote requirement and the large geographical boundaries of the Marengo County district militate toward a finding of dilution, while the other relevant considerations do not apply.

III. Conclusion

The plaintiffs are not required to prove discriminatory intent in the enactment of the challenged procedure, the question is whether the procedure has been maintained by either action or inaction "for the purpose of excluding minority input or devaluing the votes of minorities . . ." *Kirksey v. City of Jackson,* 461 F.Supp. 1282, 1313 (S.D. Miss. 1978), *citing Nevett II, supra* at 222; *Bolden v. City of Mobile,* 571 F.2d 238, 245-246 (5th Cir. 1978); *Thomasville Branch of NAACP v. Thomas County,* 571 F.2d 258 (5th Cir. 1978). The at-large procedure in the instant case was intitated in race-proof circumstances so the question is whether it is maintained as an "in-

strumentality for carrying forward patterns of purposeful and intentional segregation." *Kirksey v. Board of Supervisors of Hinds County,* 554 F.2d 139, 147 (5th Cir. 1977).

On the basis of the Court's findings on the aggregate of the *Zimmer* factors, the Court is of the opinion that the plaintiffs have failed to establish by a preponderance of the evidence that intentional discrimination is the motivating factor in the maintenance of the present at-large election system employed in Marengo County. The present effects of past discrimination enhanced by the majority vote requirement and the large geographical district do not, in this Court's opinion, preponderate over the fact that blacks have equality of access to the slating process and the fact that elected officials have been fairly responsive to the needs of blacks, in most instances conducting their business in a racially blind, even-handed manner. Accordingly, the Court is of the opinion that judgment in these matters is due to be entered in favor of the defendants in both the class action and the enforcement action.

DONE this 23rd day of April, 1979.

/s/ W. B. Hand
United States District Judge

U.S. Dist. Court
Sou. Dist. of Ala.
Filed and Entered this the
23rd day of April, 1979
Minute Entry No. 48,979
William J. O'Connor, Clerk
/s/ By: G. Walter
Deputy Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 78-474-H

United States of America,
Plaintiff,

vs.

Marengo County Commission,
et al.,
Defendants.

Judgment

This action came on for consideration by the Court, Honorable W. B. Hand, District Judge, presiding, and the Court having considered the pleadings propounded by the parties, along with the applicable law, in accordance with the Findings of Fact and Conclusions of Law handed down by the Court this day,

It is ORDERED, ADJUDGED and DECREED that the plaintiff take nothing, that the action be DISMISSED on the merits, and that costs are taxed against the plaintiff in this matter.

DONE this 23rd day of April, 1979.

/s/ W.B. Hand
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 77-445-H

James Clark, et al.,
Plaintiffs,

vs.

Marengo County, et al.,
Defendants.

Judgment

This action came on for consideration by the Court, Honorable W. B. Hand, District Judge, presiding, and the Court having considered the pleadings propounded by the parties, along with the applicable law, in accordance with the Findings of Fact and Conclusions of Law handed down by the Court this day,

It is ORDERED, ADJUDGED and DECREED that the plaintiffs take nothing, that the action be DISMISSED on the merits, and that costs are taxed against the plaintiffs in this matter.

DONE this 23rd day of April, 1979.

/s/ W. B. Hand
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office of the Clerk
Gilbert F. Ganucheau
Tel. 504—589-6514
600 Camp Street
New Orleans, La. 70130

October 3, 1979

MEMORANDUM TO COUNSEL OR PARTIES
LISTED BELOW:

No. 79-2525 - U.S.A. vs. Marengo County Commission, et al.

The following action has this day been taken in the above case:

( ) AN EXTENSION OF TIME has been granted to and including

( ) for filing appellant's/petitioner's brief.

( ) for filing appellee's/respondent's brief.

( ) for filing reply brief.

( ) for filing petition for rehearing -

( )

( ) Motion to consolidate granted.

( ) Motion to supplement or correct the record granted.

( ) Motion for leave to file supplemental brief granted.

( ) Motion for leave to file brief *amicus curiae* is granted.

( ) Joint motion as to time for filing briefs granted.

( ) Order enclosed has been entered.

(XXX) Appellant's motion to hold the appeal in abeyance has been GRANTED.

cc: Mr. W. A. Kimbrough, Jr.
Ms. Miriam R. Eisenstein
Mr. H. A. Lloyd
Mr. Cartledge W. Blackwell, Jr.

GILBERT F. GANUCHEAU, Clerk

/s/ By Betty G. Martinez
Deputy Clerk

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B

No. 79-2525

United States of America,
Plaintiff-Appellant,

vs.

Marengo County Commission,
et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Alabama

U.S. Court of Appeals
Filed Aug. 6, 1980

Before TJOFLAT, VANCE and THOMAS A. CLARK, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellant's motion to remand this case to the United States District Court for the Southern District of Alabama is GRANTED. The judgment of the district court is VACATED and the case is REMANDED to that court for further proceedings, including the presentation of such additional evidence as is appropriate, in light of the decision of the Supreme Court in *City of Mobile v. Bolden,* April 22, 1980, No. 77-1844, 48 U.S.L.W. 4438.

VACATED and REMANDED.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 78-474-H

United States of America,
Plaintiff,

vs.

Marengo County Commission,
Marengo County, Alabama;
Frank J. Norris, President,
D. W. Holt, Grey Etheridge,
Jimmie Brame and James W.
Edmonds, Commissioners;
Marengo County Board of
Education, Marengo County,
Alabama; M. W. Mckee,
President, Thomas Miller,
Robert Tucker, Wallace
Flowers and Moses Lofton,
Members; Sammie Davis,
Probate Judge; J. C. Camp,
Chairman, Marengo County
Democratic Executive
Committee; and J. Marks
Abernathy, Chairman,
Marengo County Republican
Executive Committee,
W. H. "Billy" Smith, Sheriff
of Marengo County, and Dwayne
Sealey, Circuit Clerk of
Marengo County,
Defendants.

Judgment

This action came on for hearing before the Court on remand from the United States Court of Appeals for the Fifth Circuit, Honorable W. B. Hand, District Judge, presiding, and the issues having been duly decided and a final decision having been duly rendered,

It is Ordered and Adjudged

that the plaintiff, the United States of America, recover nothing;

that the action be dismissed on the merits.

DONE this 30th day of July, 1981.

/s/ W. B. Hand
Chief Judge

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED & ENTERED THIS THE
30TH DAY OF JULY, 1981
MINUTE ENTRY NO. 52,940
WILLIAM J. O'CONNOR, CLERK
By: G. Walter
Deputy Clerk

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
NORHTERN DIVISION

Civil Action No. 78-474-H

United States of America,
Plaintiff,

vs.

Marengo County Commission,
Marengo County, Alabama;
Frank J. Norris, President,
D. W. Holt, Grey Etheridge,
Jimmie Brame and James W.
Edmonds, Commissioners;
Marengo LCounty Board of
Education, Marengo County,
Alabama; M. W. McKee,
President, Thomas Miller,
Robert Tucker, Wallace
Flowers and Moses Lofton,
Members; Sammie Davis,
Probate Judge; J. C. Camp,
Chairman, Marengo County
Democratic Executive
Committee; and J. Marks
Abernathy, Chairman,
Marengo County Republican
Executive Committee,
W. H. "Billy" Smith, Sheriff
of Marengo County, and Dwayne
Sealey, Circuit Clerk of
Marengo County,
Defendants.

Order

This suit by the United States ("the enforcement action") attacks the at-large election of the members of both the Marengo County Commission and the Marengo County Board of Education. The enforcement action by the Government was consolidated for trial. Fed. R. Civ. P. 42(a), with a similar action brought by private plaintiffs as a class action ("the class action"). On April 23, 1979 the Court entered judgment in favor of the defendants in both the enforcement action and the class action. The opinion of the Court is reported at 469 F. Supp. 1159. Only the Government appealed. After the Supreme Court announced its decision in *City of Mobile v. Bolden,* 446, U.S. 55, 100 S. Ct. 1490, 64 L. Ed. 2d 47 (1980), the Fifth Circuit Court of Appeals remanded the case at bar for futher consideration. See Order of August 6, 1980.

Since the decision by the Supreme Court in *Bolden* various panels from this circuit have wrestled with the decision in an effort to distill its meaning. *See, e.g., Lodge v. Buxton,* 639 F.2d 1358 (5th Cir. 1981); *Corder v. Kirksey,* 639 F.2d 1191 (5th Cir. 1981); *McMillan v. Escambia County, Florida,* 638 F.2d 1239 (5th Cir. 1981); *appeal docketed,* 49 U.S.L.W. 3896 (U.S. May 19, 1981) (No. 80-1946); *Jenkins v. City of Pensacola,* 638 F.2d 1249 (5th Cir. 1981), *petition for cert. filed,* 49 U.S.L.W. 3896 (U.S. May 20, 1981) (No. 80-1962); *United States v. Uvalde consolidated Independent School System,* 625 F.2d 547 (5th Cir. 1980), *cert denied,* 49 U.S.L.W. 3860 (U.S. May 18, 1981) (No. 80-1237) (Rehnquist, J., dissenting from denial of certiorari and filing written dissent).

The surest statement of black-letter law which emerges from these cases was written by Judge Peter T. Fay:

> THE RULE ESTABLISHED
>
> A cause of action under the Fourteenth or Fifteenth Amendment asserting unconstitutional vote dilution

> through the maintenance of an at-large electoral system is legally cognizable only if the allegedly injured group establishes that such system was created or maintained for *discriminatory purposes*. A discriminatory purpose may be inferred from the totality of circumstantial evidence. An essential element of a *prima facie* case is proof of unresponsiveness by the public body in question to the group claiming injury. Proof of unresponsiveness, alone, does not establish a prima facie case sufficient to shift the burden of proof to the party defending the constitutionality of the system; responsiveness is a determinative factor only in its absence. The *Zimmer* criteria may be indicative but not dispositive on the question of intent. Those factors are relevant only to the extent that they allow the trial court to draw an inference of intent. The *Zimmer* criteria are not the exclusive indicia of discriminatory purpose and, to the extent they are not factually relevant in a given case, they may be replaced or supplemented by more meaningful factors. Even if all of the *Zimmer* and other factors are established, an inference of discriminatory purpose is not *necessarily* to be drawn. The trial court must consider the totality of the circumstances and ultimately rule on the precise issue of discriminatory purpose. Finally, given the reality that each case represents an extremely unique factual context for decision, this Court will give great deference to the judgment of the trial court, which is in a far better position to evaluate the local political, social, and economic realities than is this Court.

Lodge v. Buxton, 639 F.2d 1358, 1375 (5th Cir. 1981) (footnote omitted).

As Judge Fay repeatedly emphasized throughout his opinion, "The Supreme Court implicitly concluded in *Bolden*, as we explicitly do today, that absent such proof of unresponsiveness a *prima facie* case can not be established." *Id.* at 1373-74. When this Court initially considered the evidence in the case *sub judice*

the Court recognized that the issue vel non of responsiveness was *momentous*. 469 F. Supp. at 1179 n.35 (quoting ***Blacks United for Lasting Leadership v. City of Shreveport,*** 571 F.2d 248, 254 (5th Cir. 1978)). No credible evidence supported a finding of unresponsiveness by the defendants in Marengo County. Nothing persuades the Court that this original finding was incorrect. *Id.* at 1179.

Because the Government failed to prove unresponsiveness it has failed to make out a prima facie case against the Marengo County defendants. *Lodge v. Buxton.* The intervening decision by the Supreme Court in *Bolden* is not, by itself, a reason to allow the Government an opportunity to present additional evidence. Compare *Jones v. City of Lubbock,* No. 79-2744 (5th Cir. Mar. 25, 1981) (per Goldberg, J.; dissenting; "[D]ue process and precedent mandate that when the rules of the game are changed, the players must be afforded a full and fair opportunity to play by the new regulations."). The Government has had its opportunity to demonstrate a violation of the law. The historical evidence going to the reasons for the adoption of at-large elections which the Government had indicated it would offer on remand would add nothing. Without proof of unresponsiveness by the defendants in Marengo County the Government must fail.

It is ordered that judgment be granted in favor of the defendants.

DONE this 30th day of July, 1981.

/s/ W. B. Hand
Chief Judge

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED & ENTERED THIS THE
30TH DAY OF JULY, 1981
MINUTE ENTRY NO. 52,939
WILLIAM J. O'CONNOR, CLERK
/s/ G. Walter
Deputy Clerk

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7796

United States of America,
Petitioner-Appellant,

vs.

Marengo County Commission,
et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the
Southern District of Alabama

ORDER:

IT IS ORDERED THAT the motion of appellant to hold appeal in abeyance pending action by the Supreme Court in *Rogers v. Lodge* is GRANTED.

/s/ illegible
Chief Judge

APPENDIX I

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

MARENGO COUNTY COMMISSION, et al.,
Defendants-Appellees.

No. 81-7796.

United States Court of Appeals,
Eleventh Circuit.

May 14, 1984

WISDOM, Senior Circuit Judge:

In 1979 the district court held that the at-large system for electing the Marengo County, Alabama county commission and school board did not violate the Fourteenth and Fifteenth Amendments; the Civil Rights Act of 1870, as amended, 42 U.S.C. § 1971 (a) (1976); and section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973 (1976). *Clark v. Marengo County,* 1979, S.D.Ala., 469 F.Supp. 1150. Since that time, we have remanded this case once, and the Supreme Court has issued two decisions affecting the standard of proof in constitutional discrimination cases. *Rogers v. Lodge,* 1982, 458 U.S. 613, 102 S.Ct. 3272, 73 L.Ed.2d 1012; *City of Mobile v. Bolden,* 1980, 466 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d. 47. Furthermore, in 1982 Congress amended section 2 of the Voting Rights Act to restore the legal standard that governed voter discrimination decisions before the Supreme Court decided

Mobile v. Bolden.[1] We now hold that the 1982 amendment to section 2 applies to this case; that amended section 2 is a constitutional exercise of congressional enforcement power under the Fourteenth and Fifteenth Amendments; and that the district court was clearly erroneous in holding that Marengo County's at-large system had no discriminatory results as of the time of trial. We remand this case to the district court to allow the parties a limited opportunity to update the record and, in the event that the court finds a continuing violation of the Voting Rights Act, to allow the court to devise an appropriate remedy.

I.

Marengo County is a sparsely populated rural county covering 978 square miles in west central Alabama. Its 1950 population of 29,494 had decreased to 27,098 in 1960 and to 23,819 in 1970. Blacks comprised 69% of the population in 1950, 62.1% in 1960, and 55.2% in 1970. The percentage of blacks in the voting age population has likewise declined over the years: from

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[1] "In sum, prior to the Supreme Court's decision in *Bolden,* it was generally assumed that section 2 covered voting laws and practices having a racially discriminatory effect. That view was grounded in the legislative history of the Voting Rights Act, both in 1965 and 1970, as well as analysis in the lower courts . . . The *Bolden* decision dealt minority voters a severe blow. It repudiated the legal standard under which minorities had successfully overcome voting barriers denying them equal access to the political process. Congress, in amending section 2 of the Voting Rights Act, has acted to overrrule the *Bolden* plurality's requirement that discriminatory intent be proved to establish a violation. The new section 2 enacts a standard which focuses on the *results* and *consequences* of challenged electoral practices rather than the motivation behind them . . ."

Parker, *The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard,* 69 Va.L.Rev. 715, 729, 764 (1983). *See also* Boyd and Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History,* 40 Wash. & Lee L.Rev 1347 (1983).

56.1% in 1960 to 50.8% in 1970. The parties stipulated that at the time of trial 16,000 persons were qualified to vote, of whom 44 percent were black. Blacks have always constituted a minority of registered voters.[2] There are great social and economic disparities between blacks and whites.[3]

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[2] The population figures are:

Year	Total Population	White	Percent	Black	Percent
1950	29,494	9,018	30.6	20,473	69.4
1960	27,098	10,270	37.9	16,828	62.1
1970	23,819	10,662	44.8	13,157	55.2
1980	25,047	11,663	46.6	13,346	53.2
	For voting age population, the figures are:				
1960	13,895	6,104	43.9	7,791	56.1
1970	14,113	6,949	49.2	7,791	50.8
1980	16,534	8,460	51.2	8,045	48.7

The 1980 figures were not available to the trial court when this case was first tried in 1978-79. *See* note 50.

The registration data are as follows:

Year	Total	White	Percent	Black	Percent
1970	14,630	8,058	56.1	6,302	43.9
1978	18,821	10,856	57.7	7,965	42.3

These figures show more persons registered to vote than are of voting age; voters who have moved or died are often not purged from the rolls. Transcript 1069-72, 1202-04.

[3] The district court described the socioeconomic plight of blacks in Marengo County:

> "The 1970 Census figures reveal that 744 of the 11,861 persons of 25 years of age and older had never attended school and that 1,652 of that number had completed only four years of education or less, establishing that 20.2% of the total 1970 population aged 25 years or older had either never attended school or had not completed more than four years of formal education. The

The County Commission (formerly the Board of Revenue) and the Board of Education have five members each.[4] Before

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same census figures reveal that in 1970 there were 5,905 black persons in Marengo County aged 25 years or older, that 690 of these had never attended school, and that 1486 of these had attended school for four years or less. Thus, the 36.9% of the black population over 25 years of age either never attending school or completing four years or less greatly exceeds the county-wide percentage of 20.2%. The figures further reveal that of the 2,244 Marengo County families who were below the poverty level in 1970, 1,841 (82%) were black, and that while the median income for all families in 1970 was $4,909.00 with a mean income of $6,478.00, the black family's median income was $2,456.00 and its mean income was $3,175.00. *General Social and Economic Characteristics, Alabama,* Tables 124 & 128, U.S. Department of Commerce Bureau of the Census (1970). The housing figures from the 1970 Census depict a similar pattern of black poverty. 3,045 (40%) of the 7,341 housing units in Marengo County lacked some or all plumbing facilities, and 2,440 (71%) of the 3,357 housing units with black heads of household lacked some or all of such facilities. *General Housing Characteristics, Alabama,* pp. 2-74, U.S. Department of Commerce Bureau of the Census (1970). According to a 1976 survey, 2,824 (36%) of the 7,990 housing units in Marengo County were rated "substandard." State Housing Plan (June 1976) of the Alabama Development Office (Gov. Exhibit 47). Finally, Census figures reveal that the 1970 per capita income in Marengo County was $1,639.00 while for black persons it was only $722.00 (1970 Census, pp. 2-378 & 2-402)."

469 F.Supp. at 1155. These disparities are even starker when the statistics for blacks are compared with those for non-blacks rather than with overall averages. For example, while 36.9% (2,176 of 5,905) blacks aged 25 and older had less than four years of education in 1970, this was true for only 3.7% (220 of 5,956) of nonblacks. *See* Government Exhibit No. 47, stipulations 8-9.

[4] The Board of Revenue was created in 1923, replacing the Court of County Commissioners. Act of Sept. 19, 1923, No. 311, 1923 Local Acts of Alabama 188. The statute provided for four-year terms, and stated, "The president of the Board of Revenue shall be elected by the qualified voters of the entire County, and the member of the Board of

1955 each body had a president, elected at-large, and four members elected from districts. In 1955 the state legislature provided that all members of both bodies would be elected at-large, with the requirement that one member live in each of the four existing districts.[5] In 1966 the legislature provided for staggered four-year terms.[6]

Before 1965 no black ran for any office in Marengo County. Between 1966 and 1978 there were 73 county-wide elections in which blacks ran against whites.[7] One black was elected County Coroner in 1978 by winning the Democratic primary by a margin of 3,719 to 3,617 over a white candidate. Another black was appointed to the school board.[8]

Revenue from each District shall be elected by the qulaified voters of such district." *Id* § 2, 1923 Local Acts of Alabama at 189. In 1935, the School Bord was organized along the same lines, except that the president and members were elected for six-year terms. Act of July 8, 1935, No. 183, §§ 1-4, 1935 Ala. Acts 106, 106-07.

[5] Act of February 17, 1955, No. 17, 1955 Ala.Acts 45 (Board of Revenue); Act of July 29, 1955, No. 184, 1955 Ala.Acts 458 (Board of Education). The 1955 act also adopted four-year terms for the Board of Education. *Id* §§ 3-4, 1955 Ala.Acts at 459.

[6] Act of August 16, 1966, No. 44, 1966 Ala.Acts 67 (Board of Revenue); Act of August 16, 1966, No. 45,, 1966 Ala.Acts 68 (Board of Education).

[7] The record is not clear as to how many black candidates actually ran for county office during this period. Some of the 73 county-wide elections identified were elections for state or national offices; moreover, a single candidacy might be counted several times if there were multiple elections (e.g. runoffs) for the same office.

[8] Both were apparently reelected without opposition after this case was tried. Brief for the Appellees at 25.

On August 15, 1977 a group of blacks filed a class action alleging that Marengo County's at-large system for electing the county commission and school board unlawfully diluted the voting rights of blacks. One year later, the United States filed suit under the Voting Rights Act.[9] The court tried the case on October 23-25, 1978 and January 4, 1979. On April 23, 1979 the district court issued an opinion and entered judgment for defendants. The court concluded that the plaintiffs had not proved that the at-large system was being maintained with a discriminatory purpose. 469 F.Supp. at 1180.

The United States appealed to the Fifth Circuit. On April 22, 1980, the United States Supreme Court decided *City of Mobile v. Bolden,* 1980, 445 U.S. 55, 1090 S.Ct. 1490, 64 L.Ed.2d 47. *Mobile v. Bolden* held that in vote dilution cases discriminatory intent must be shown to establish a constitutional violation, and it raised doubts about the methodology used by the Fifth Circuit in vote dilution cases. This Court accordingly remanded the case to the district court "for further proceedings, including the presentation of such additional evidence [as] is appropriate, in light of [*Mobile v. Bolden*]". *United States v. Marengo County Commission,* No. 79-2525 (5 Cir. Aug. 6, 1980), Record 448.

On May 20, 1981, the Fifth Circuit decided *Lodge v. Buxton,* 5 Cir.1981, 639 F.2d 1358. *Lodge* held that *Mobile v. Bolden* does not require direct evidence of discriminatory intent but stated, "An essential element of a *prima facie* case [of unconstitutional vote dilution] is proof of unresponsiveness by the public body in question to the group claiming injury." 639 F.2d at 1375. On July 30, 1981, the district court in the present case

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[9] The complaint alleges that the at-large election systems for the County Commission and Board of Education violate the Fourteenth and Fifteenth Amendments and 42 U.S.C. §§ 1971(a) and 1973. Jurisdiction was predicated on 28 U.S.C. §§ 1345 and 2201 and 42 U.S.C. §§ 1971(d) and 1973j(f).

again ordered judgment for defendants on the ground that the plaintiffs had not established unresponsiveness. The court rejected the United States' offer to present additional evidence, including evidence concerning the reasons for the adoption of at-large elections in Marengo County, because it concluded that this evidence "would add nothing" to show unresponsiveness. Record 499-501.

[1,2] The United States again appealed, and we granted its motion to hold this appeal in abeyance pending review of *Lodge v. Buxton* (sub nom. *Rogers v. Lodge*) by the United States Supreme Court. On July 1, 1982, the Supreme Court affirmed the result in *Lodge,* but held that unresponsiveness is not an essential element of a claim of unconstitutional vote dilution. Instead, the court held that "unresponsiveness is an important element but only one of a number of circumstances a court should consider in determining whether discriminatory purpose may by inferred". *Rogers v. Lodge,* 458 U.S. at 625 n. 9, 102 S.Ct. at 3280 n. 9.[10]

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[10] In the light of *Rogers v. Lodge* it is apparent that the district court's rulings on intent must be vacated. Unresponsiveness is not the essential factor in showing intent that the district court held it to be. Furthermore, the record demonstrates significant unresponsiveness to black political and functional needs on the part of the School Board and the Board of Registrars. *See* part VB of this opinion. And the district court erred when it held "that since the election procedures in question were enacted in 1923 and 1935 when blacks had been effectively disenfranchised, there can be no allegation that the at-large schemes were racially motivated in their enactment." 469 F.Supp. at 1172. The at-large system was in fact enacted in 1955, a year after *Brown* I. *Brown v. Board of Education,* 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873. The history of discriminatory voting practices is far too complex for any court to conclude that a statute was not enacted with discriminatory intent simply because blacks could not vote when the statute was adopted. In *NAACP v. Gadsden County School Board,* 11 Cir.1982, 691 F.2d 978, 982, a panel of this Court found clearly erroneous a district court's conclusion that a 1947 change to at-large elections in Florida had no discriminatory purpose. The at-large system used in Mobile was adopted in 1911, when blacks were disen-

The 1982 amendment to section 2 of the Voting Rights Act became effective on June 29, 1982. Pub.L. No. 97-205, sec. 6, 96 Stat. 131, 135. Congress redefined the scope of section 2 of the Act to forbid not only those voting practices directly prohibited by the Fifteenth Amendment but also any practice "imposed or applied . . . in a manner which *results* in a denial or abridgement of the right . . . to vote on account of race or color . . ." 42 U.S.C.A. § 1973(a) (West Supp.1983) (emphasis added). *See* S.Rep. No. 417, 97th Cong., 2d Sess. (1982), *reprinted in* 1982 U.S.Code Cong. & Ad.News 177 [1982 Senate Report]. The United States urges us to apply the amended statute to the existing record and hold as a matter of law that Marengo County's at-large system has a discriminatory "result". In response, the defendants argue that the 1982 amendment does not or should not apply to this litigation; that section 2 does not apply to vote dilution claims; that the 1982 amendment is unconstitutional; and that the findings of the district court are not clearly erroneous.

II.

"[A] court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. Richmond School Board,* 1974, 416 U.S.

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franchised, but after a painstaking and scholarly analysis of the history of Mobile the district court concluded, and the Supreme Court affirmed, that the at-large system was originally conceived as part of a comprehensive scheme, devised after Reconstruction, to disenfranchise blacks. *See Bolden v. City of Mobile,* 1982, S.D.Ala., 542 F.Supp. 1050; *Brown v. Board of School Commissioners,* 1982, S.D.Ala., 542 F.Supp. 1078, *aff'd,* 11 Cir. 1983, 706 F.2d 1103, *aff'd mem.,* 1983, ____ U.S. ____, 104 S.Ct. 520, 78 L.Ed.2d 705. The district court denied the government the opportunity to present evidence concerning the history of the at-large system in Marengo County, a clearly erroneous ruling.

696, 711, 94 S.Ct. 2006, 2016, 49 L.Ed.2d 476, 488. This principle goes back as far as *United States v. Schooner Peggy,* 1801, 5 U.S. (1 Cranch) 103, 2 L.Ed. 49, in which Chief Justice Marshall stated,

> "It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns . . . the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside."

5 U.S. (1 Cranch) at 110. The defendants argue that "manifest injustice" would be done if the amended version of section 2 were applied here. We find, however, that the legislative history of the amendment, and the vital public interest in insuring effective participation in the political process for every citizen, mandate our aplication of the law in effect now.

[3] In general, it is unnecessary to find affirmative support in a statute or its legislative history for applying it to pending cases. A statute will be assumed to apply to cases pending at the time of its passage unless there is a "clear indication" that it is *not* to apply. *Bradley,* 416 U.S. at 712-716, 94 S.Ct. at 2016-2018. Here there is certainly no such indication in either the statue or its legislative history. On the contrary, the available evidence suggests that Congress expected the amendment to govern a case such as the one now before the Court. Both Representative Sensenbrenner and Senator Kennedy explicityly stated during debate that

> "Section 2, unlike the bailout procedure added by this bill, will take effect immediately, and will, of course, apply to pending cases in accordance with the well established principles of *Bradley v. City of Richmond.* 416 U.S. [696] 686 [94 S.Ct. 2006, 40 L.Ed.2d 476] (1974) and *United States*

of America v. Alabama. 362 U.S. 602 [80 S.Ct. 924, 4 L.Ed.2d 982] (1980)."

128 Cong.Rec. H3841 (daily ed. June 23, 1982) (remarks of Rep. Sensenbrenner); *id.* at S7095 (daily ed. June 18, 1982) (remarks of Sen. Kennedy).[11]

[4] Our application of the amended version of section 2 will serve important public interests without doing any injustice to the parties. *Bradley* holds that in determining whether the application of the new law is just, a court should consider "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." 416 U.S. at 717, 94 S.Ct. at 2019. All these considerations strongly support applying the amendment to this case.

The first consideration, the nature of the parties, arises from the distinction, described in *Schooner Peggy,* between private disputes and "great national concerns". Although it may not be imperative to apply new congressional enactments to preexisting disputes over private issues, when the new statute manifest important public policy, court must respect that policy and apply it. There is no question that this case is a public matter, concerning the most fundamental of public rights, the right to participate in the political process.

The second consideration, the nature of the rights, is intended to protect personal rights that have "matured or become unconditional". *Bradley,* 416 U.S. at 720, 94 S.Ct. at 2020. There are no such rights here. The defendants argue that to apply amended section 2 "would operate to deprive the state officials of a

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[11] The Senate Report refers to the district court's 1981 decision in this case as an example of why statutory change was required. 1982 Senate Report at 39 & n. 147. This suggests that Congress intended that its amendment of section 2 might change the result in this case and others like it when relief had previously been denied under the constitutional standard of discriminatory intent.

vested right to enact and/or maintain state lawsd, which at the time of the enactment, and at the times alleged in this suit, were being maintained under constitutionally acceptable conditions." Brief for Appellees at 8. Even assuming that the at-large system did not violate constitutional or statutory prohibitions effective in 1955 or 1978, the defendants' "vested right" theory is unsound. Under that theory segregated public transit would still be permissible since it was legal (according to *Plessy v. Ferguson*) when adopted. The defendants fail to distinguish between retroactive and prospective application of the statute. This court is unconcerned with whether the enactment of the at-large system met the legal standard in effect in 1955. Rather, the question is whether the *present maintenance* of that system meets the standards in effect *now*. No government entity has a "vested right" to continue practices validly prohibited by Congress.

The third consideration "stems from the possibility that new and unanticipated obligations may be imposed upon a party without notice or an opportunity to be heard." *Bradley*, 416 U.S. at 720, 94 S.Ct. at 2021. There is no such problem here. The defendants are "burdened" in no way by the application of the amended statute: they become liable for no added obligations on account of any actions taken before the statute became effective.[12]

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[12] At oral argument the defendants put forth the contention that section 2 cannot be applied retroactively because violations of section 2 are punishable as criminal offenses under section 12 of the Voting Rights Act, 42 U.S.C. § 1973j(a), (c) (1976). The defendants assert that retroactive application of section 2 is therefore forbidden under Art. I, § 9, clause 3 of the Constitution, which prohibits Congress from passing any ex post facto law. There is nothing "retroactive" in our application of the amended statute to this case; the complaint seeks only prospective relief. Sections 2 and 12 do not impose criminal liability for actions, taken before the amended version of section 2 became effective, that were in conformity with the legal standards existing at the time.

The application of the amended statute to this case certainly does not work "manifest injustice".[13] Moreover, that application also accords with the basic principle that courts do not issue advisory opinions. This lawsuit seeks only prospective relief, and only the legal standard governing now is relevant to whether a prospective remedy is appropriate. *See Rybicki v. State Board of Elections,* 1983, E.D.Ill., 574 F.Supp. 1147, 1148 n. 3 (3 judge court). If this Court rendered judgment under the old version of section 2, that judgment would have no res judicata effect, and a new lawsuit could be filed under the new law. *Kirksey v. City of Jackson,* 5 Cir.1983, 714 F.2d 42. To apply the old standard here, therefore, would be an exercise in futility: a finding in favor of the defendants would not be binding on the plaintiffs.

III.

The defendants assert that a vote dilution claim is not cognizable under the amended version of section 2 of the Voting Rights Act. This argument is wholly without merit. The theory appears to be that section 2 is either a codification of the Fifteenth Amendment or based only on that amendment's enforcement clause, and that in either case the Fifteenth Amendment does not cover cases of vote dilution, which must be prosecuted only under the Fourteenth Amendment. This argument is faulty on several grounds. Although the plurality opinion in *Mobile v. Bolden* did suggest that vote dilution is a Fourteenth Amendment issue, 446 U.S. at 64-65, 100 S.Ct. at 1498-1499, we have since held that a majority of the Court in *Mobile* concluded that the Fifteenth Amendment, as well as the Fourteenth, protects not only against denial of the right to vote but against dilution

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[13] Although the defendants have not indicated that, in fact, they have additional evidence relevant to result, we are allowing the defendants an opportunity to introduce any such evidence on remand. *See* part VI of this opinion.

of that right as well. *Lodge v. Buxton,* 639 F.2d at 1372-73; *United States v. Uvalde Consolidated Independent School District,* 5 Cir.1980, 625 F.2d 547, 551-551, *cert. denied,* 1981, 451 U.S. 1002, 101 S.Ct. 2341, 68 L.Ed.2d 858; *accord Perkins v. City of West Helena,* 8 Cir.1982, 675 F.2d 201, 205-06, *aff'd mem.,* 1982, 459 U.S. 801, 103 S.Ct. 33, 74 L.Ed.2d 47. As Justice Frankfurter stated in *Lane v. Wilson,* 1939, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281,

> "The reach of the Fifteenth Amendment against contrivances by a state to thwart equality in the enjoyment of the right to vote by citizens of the United States regardless of race or color, has been amply expounded by prior decisions. . . . The Amendment nullifies sophisticated as well as simple-minded modes of discrimination."

307 U.S. at 275, 59 S.Ct. at 876.

[5] In any case, it *is* clear that the equal protection clause of the Fourteenth Amendment does apply to vote dilution, *Brown v. Board of School Commissioners of Mobile County,* 11 Cir.1983, 706 F.2d 1103, 1107, *aff'd mem.,* 1983, ____ U.S. ____, 104 S.Ct. 520, 78 L.Ed.2d 705, and equally clear that the 1982 amendments to the Voting Rights Act were based on the enforcement clauses of both amendments. 1982 Senate Report at 39-43. Although *Mobile v. Bolden* held that the orginial version of section 2 was only a statutory codification of section 1 of the Fifteenth Amendment, Congress amended the statute to prohibit practices not directly prohibited by the Fifteenth Amendment. *See Mobile v. Bolden,* 446 U.S. at 61, 100 S.Ct. at 1496 (plurality opinion); *id.* at 105 n. 2, 100 S.Ct. at 1520 n. 2 (Marshall, J., dissenting); 1982 Senate Report at 39-40.

[6] The defendants contend that it is "abundantly clear" that section 2 protects only "access to the political processes". We reject any assertion that the statute as amended applies only to formal barriers to access such as literacy or residency tests. The goal of the Voting Rights Act has always been to ensure an *ef-*

fective right of participation.[14] That this continues to be the case is made "abundantly clear" by the words of the amended statute and its history. The statute is violated if a protected class has "lass opportunity than other members of the electorate to participate in the political process *and to elect representatives of their choice*". 42 U.S.C.A. § 1973(b) (West Supp.1983) (emphasis added). The act states further, "The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered" in determining if the statute is violated. *Id.* The amendment was passed in direct response to the Supreme Court's decision in *Mobile v. Bolden,* a dlution case. In that decision the Court increased the burden on the plaintiffs by requiring them to prove intentional discrimination in election procedures. This "intent" standard was so difficult to meet that the Justice Department stopped bringing suits under section 2.[15] It would defy reason to hold that the amendment was not intended to cover the very type of case that provoked its passage. *See* 1982 Senate Report at 15-17. The legislative history both in support and in opposition to the amendment is replete with discussion of how the amendment will apply to vote dilution cases. There is not a word to suggest any doubt about *whether* it would apply to such cases. *See* Parker, *The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard,* 69 Va.L.Rev. 715, 762-64 (1983).

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[14]. For example, the preclearance provisions of section 5 were adopted to prevent states from devising new means of depriving blacks of the effective right to vote, after Congress banned the leteracy tests and poll taxes previously used for that purpose. *South Carolina v. Katzenbach,* 1966, 383 U.S. 301, 334-35, 86 S.Ct. 803, 822, 15 L.Ed.2d 769, 790-791.

[15]. Christian Science Monitor, April 14, 1982, at 27 (column by Rep. Don Edwards of California).

We therefore hold that the amended version of section 2 was intended to apply to the problem of vote dilution that this case presents. it remains for us to consider whether the amendment is constitutional, and if so, how it affects the district court's ruling in this case.

IV.

The defendants argue that because the amended version of section 2 prohibits some voting practices not directly prohibited by the Constitution, it is unconstitutional. In the defendants' view, Congress usurped the power of the Supreme Court to interpret the Constitution by attempting to overrule *Mobile v. Bolden*. Congress explicitly acknowledged the binding effect of the Supreme Court's constitutional interpretation and relied not on any independent power to interpret the Constitution but rather on congressional power to *enforce* the Civil War Amendments. The defendants, however, contend that the enforcement power does not authorize Congress to adopt a statutory "results" test for voting discrimination.

[7] The defendants argue that the scope of only the Fifteenth Amendment's enforcement clause is at issue, but for the reasons explained in part III of this opinion the question is rather the extent of the power of Congress under the Constitution as a whole. We therefore consider whether a statutory results test is authorized under the combined grant of authority in the enforcement clauses of the Fourteenth and Fifteenth Amendments. It has long been recognized that these provisions of the Constitution grant authority to Congress "no less broad than its authority under the Necessary and Proper Clause...." *City of Rome v. United States,* 1980, 446 U.S. 156, 175, 100 S.Ct. 1548, 1560, 64 L.Ed.2d 119, 138; *accord South Carolina v. Katzenbach,* 1966, 383 U.S. 301, 326-327, 86 S.Ct. 803, 817-18, 15 L.Ed.2d 769, 785-86; *Ex parte Virginia,* 1880, 100 U.S. 339, 345-46, 25 L.Ed. 676, 679. The extent of the "necessary and proper" power was first explained by Chief Justice Marshall in *M'Culloch v. Maryland,* 1819, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579:

> "[T]he sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

17 U.S. (4 Wheat.) at 421. The enforcement clauses of the Civil War Amendments grant Congress the power to adopt.

> "Whatever legislation is appropriate, that is, adapted to carry out the objects the Amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against state denial or invasion, if not prohibited, ..."

Ex parte Virginia, 100 U.S. at 345-46. Congress may invalidate the perpetuation of earlier purposeful discrimination, and act to eradicate the continuing effects of that discrimination. *City of Rome,* 446 U.S. at 176-77, 100 S.Ct. at 1561-62.

Congress has prohibited a variety of voting practices not necessarily prohibited directly by the Constitution, and the Supreme Court has upheld these exercises of the enforcement power. *In South Carolina v. Katzenbach,* 1966, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769, the Court upheld a suspension of literacy tests in specific jurisdictions. In *Katzenbach v. Morgan,* 1966, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828, the Court upheld a prohibition on the use of English literacy tests to disenfranchise citizens educated in Puerto Rico. In *Oregon v. Mitchell,* 1970, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272, the Court unanimously upheld a nationwide ban on literacy tests

and by an 8-1 margin upheld limitations on residency requirements in presidential elections. In *South Carolina v. Katzenbach* and again in *City of Rome* the Court upheld the preclearance provisions of the Voting Rights Act, which require federal review of all changes in voting practices in certain jurisdictions and require the Attorney General to object to any change that is discriminatory either in purpose or effect.

The 1982 amendment to section 2 of the Voting Rights Act is clearly within the enforcement power. Congress conducted extensive hearings and debate on all facets of the Voting Rights Act[16] and concluded that the "results" test was necessary to secure the right to vote and to eliminate the effects of past purposeful discrimination. The Senate Report explains in detail why the results test was necessary and appropriate. In particular, Congress found

> "(1) that the difficulties faced by plaintiffs forced to prove discriminatory intent through case-by-case adjudication create a substantial risk that intentional discrimination barred by the Fourteenth and Fifteenth Amendments will go undetected, uncorrected and undeterred unless the results test proposed for section 2 is adopted; and (2) that voting practices and procedures that have discriminatory results perpetuate the effects of past purposeful discrimination."

1982 Senate Report at 40 (footnote omitted), U.S. Code Cong. & Admin News 1982, p. 218.

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[16] *See, e.g.*, S.Rep. No. 417, 97th Cong., 2d Sess. (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 177; H.Rep. No. 227, 97th Cong., 1st Sess. (1981); 128 Cong.REc. S6638-56 (daily ed. June 10, 1982); *id.* Nos. 74-77 (daily eds. June 14-18, 1982) (Senate); 127 Cong.REc. H6938-H7011 (daily ed. Oct. 5, 1982); 128 Cong.Rec. H3839-46 (daily ed. June 23, 1982).

Inquiry into the motives of elected officials can be both difficult and undesirable, and such inquiry should be avoided when possible.[17] The judicial and executive authorities charged with enforcing the laws may be reluctant to attribute an intent on the part of state and local officials to violate those laws.[18] In any event, proof of intent will often be hard to find:

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[17] The intent test for discrimination has been the subject of extensive debate and criticism. Many authors have concluded that intent is to hard to define, too difficult to prove, or largely irrelevant to the goal of eradicating the effects of discrimination. *See generally* Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive,* 1971 Sup.Ct. Rev. 95; Ely, *Legislative and Administrative Motivation in Constitutional Law,* 79 Yale L.J. 1205 (1970); L. Tribe, *American Constitutional Law* 1028-32 (1978); *Legislative Motivation,* 15 San Diego L.Rev. 925 (1978). Similarly, *Mobile v. Bolden* has been debated and criticized. *See, e.g.,* Butler, *Constitutional and Statutory Challenges to Election Structures: Dilution and the Value of the Right to vote,* 42 La.L.REv. 851 (1982); Soifer, *Complacency and Constitutional Law,* 42 Ohio St.L.J. 383 (1981); *The Supreme Court, 1979 Term,* 94 Harv.L.Rev. 75, 138-49 (1980). This criticism does not alter the constitutional standard: the Constitution prohibits intentional discrimination. But Congress could rationally conclude that a different statutory standard would permit fuller enforcement of that constitutional prohibition. *See* Parker, note 1, 69 Va.L.Rev. at 737-50.

[18] Congressional adoption of a statutory standard for voting rights cases is consistent with the judicial doctrine that constitutional litigation should be avoided where possible. At least once before Congress has enabled the courts to avoid a difficult constitutional issue by providing a statutory remedy under the Voting Rights Act. In section 4(e) of the 1965 Act, 42 U.S.C. § 1973b(e) (1976), Congress prohibited the use of English literacy tests to disenfranchise citizens educated in Puerto Rico and literate in Spanish. The Supreme Court sustained this provision in *Katzenbach v. Morgan,* 1966, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828. The Court was therefore able to avoid the more difficult issue of whether such a literacy test violated the Fourteenth Amendment. *Cardona v. Power,* 1966, 384 U.S. 672, 86 S.Ct. 1728, 16 L.Ed.2d 848 (remanding constitutional challenge for further consideration in the light of *Katzenbach v. Morgan*).

> "In almost all conceivable cases, the [officials who adopted or maintain the system] can articulate a plausible neutral reason for preferring the at-large method. Even where 'everyone knows' that racial considerations have had an influence on the decision, courts may be expected to be reluctant to label the decisionmakers as racists if they can avoid that unseemly task by accepting the neutral explanation. Where the responsible actor is the electorate itself, as it would be in a challenge based on a referendum, the difficulty of launching an inquiry into motive is compounded."

Hartman, *Racial Vote Dilution and Separation of Powers: An Explanation of the Conflict Between the Judicial "Intent" and the Legislative "Results" Standards,* 50 Geo.Wash.L.Rev. 689, 711-12 (1982). *See Major v. Treen,* 1983, E.D.La., 574 F.Supp. 325, 346 (3 judge court). Congress agreed with this assessment.[19]

Congress noted that charges of purposeful discrimination can have a divisive impact on local communities. 1982 Senate Report at 36. Congress also found that proving intent can be time-consuming and very costly. *Id.* Congress found that these costs were not only large but often unnecessary. In particular, Congress referred to *Mobile v. Bolden.* That case was remanded and the district court again found a constitutional violation, but only after "a tremendous expenditure of resources", in which the court examined over one hundred years of historical records to establish that at-large elections were established for discriminatory reasons. 1982 Senate Report at 36. Congress concluded that such delays and extra costs created undesirable obstacles to the eradication of purposeful discrimination.

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[19] The Senate Report notes that intent may be hard to prove because of legislative immunity, incomplete legislative history, and the ease with which non-racial purposes for a law can be offered. 1982 Senate Report at 36-37 (footnotes omitted).

The defendants assert that Congress cannot prohibit discriminatory results under the enforcement power. The case law is uniformly to the contrary. In *City of Rome* the Court stated flatly that "Congress may prohibit voting practices that have only a discriminatory effect".[20] 446 U.S. at 175, 100 S.Ct. at 1560. Both *City of Rome* and *South Carolina v. Katzenbach* upheld prohibitions on changes having discriminatory effects in jurisdictions covered by the preclearance provisions of the Voting Rights Act. The defendants do not discuss *City of Rome,* but argue that *South Carolina v. Katzenbach* made extensive and detailed findings of purposeful discrimination in the covered jurisdictions. The defendants contend that only "exceptional conditions" akin to those discussed in *Katzenbach* sustain an exercise of the enforcement power. The defendants, however, make no mention of *Oregon v. Mitchell,* in which the Court sustained a *nationwide* ban on literacy tests without demanding evidence of nationwide purposeful discrimination.

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[20] The Court has also recognized congressional power to legislate against discriminatory effects in contexts other than voting. For example, in *Fullilove v. Klutznick,* 1980, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902, Chief Justice Burger stressed that the Constitution authorizes congress to eliminate disparities that have "their roots in racial and ethnic discrimination, and which continue today, even absent any intentional discrimination or other unlawful conduct." 448 U.S. at 478, 100 S.Ct. at 2774 (Opinion of Burger, C.J.); *accord id.* at 518-19, 100 S.Ct. at 2795-96 (Opinion of Marshall, J.). The Court has repeatedly upheld the power of Congress to prohibit discriminatory effects under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. V 1981). *See, e.g., International Brotherhood of Teamsters v. United States,* 1977, 431 U.S. 324, 349, 97 S.Ct. 1843, 1861, 52 L.Ed.2d 396, 423; *Griggs v. Duke Power Co.,* 1971, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158. We have held that Congress may apply the discriminatory effects standard of Title VII to the states. *Scott v. City of Anniston,* 5 Cir.1979, 597 F.2d 897, 899-900, *cert. denied,* 1980, 446 U.S. 917, 100 S.Ct. 1850, 64 L.Ed.2d 271. Another statute that prohibits conduct having a significant discriminatory effect, without proof of discriminatory intent, is the Fair Housing Act, 42 U.S.C. §§ 3601-3619 (1976 & Supp. V 1981). *United States v. Mitchell,* 5 Cir. 1978, 580 F.2d 789, 791. The Courts

As in *Oregon v. Mitchell,* nationwide application is justified here for many reasons. Although there is no nationwide record on pervasive voting discrimination akin to the record of discrimination in the jurisdictions covered by preclearance, Congress did find evidence of substantial discrimination outside those jurisdictions. 1982 Senate Report at 92 n. 161. Congress had previously found that minority groups have been given inferior educational opportunities in localities throughout the nation and that literacy tests had been used to discriminate in jurisdictions not covered by preclearance. *See Oregon v. Mitchell,* 400 U.S. at 132-34, 91 S.Ct. at 268-69 (Opinion of Black, J.); *Id.* at 234-36, 91 S.Ct. at 319-20 (Opinion of Brennan, White, and Marshall, JJ.); S.Rep. No. 295, 94th Cong., 1st Sess. 21-35, *repreinted in* 1975 U.S. Code Cong. & Ad. News 774, 787-801. It was not unreasonable to conclude that these same nationwide problems could contribute to risks of discrimination through voting devices other than literacy tests. Moreover, minority residents of areas where purposeful discrimination is pervasive may and often do move to other areas, where the earlier discrimination against them impairs their abilitiy to participate fully in the political process.[21] We

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of Appeal have unanimously upheld the power of Congress to apply this test to local governments. *See Smith v. Town of Clarkton,* 4 Cir.1982, 682 F.2d 1055, 1065; *United States v. City of Parma,* 6 Cir.1981, 661 F.2d 562, 571-72, 573, 576, *cert. denied,* 1982, 456 U.S. 926, 102 S.Ct. 1972, 72 L.Ed.2d 441; *Resident Advisory Board v. Rizzo,* 3 Cir.1977, 564 F.2d 126, 146-48, *cert. denied,* 1978, 435 U.S. 908, 98 S.Ct. 1457, 55 L.Ed.2d 499; *Metropolitan Housing Development Corp v. Village of Arlington Heights,* 7 Cir.1977, 558 F.2d 1283, 1288-90, *cert denied,* 1978, 434 U.S. 1025, 98 S.Ct. 752, 54 L.Ed.2d 772, *on appeal after remand,* 7 Cir.1980, 616 F.2d 1006, 1008, 1010-11; *United States v. City of Black Jack,* 8 Cir. 1974, 508 F.2d 1179, 1183-86, *cert denied,* 1975, 422 U.S. 1042, 95 S.Ct. 2656, 45 L.Ed.2d 694.

[21] *See Oregon v. Mitchell,* 400 U.S. at 233-34, 91 S.Ct. at 319-20 (Opinion of Brennan, White, and Marshall, JJ.); *id.* at 283, 91 S.Ct. at 344 (Opinion of Stewart, J.).

take judicial notice of the fact that different minorities have been subject to different kinds of discrimination in different places.[22] Congress could justifiably conclude that a nationwide prohibition of voting practices with discriminatory results was necessary to remedy the effects of purposeful discrimination throughout the country. "Congress may paint with a much broader brush than may this Court...." *Oregon v. Mitchell,* 400 U.S. at 284, 91 S.Ct. at 344 (Opinion of Stewart, J.)

Finally, Congress found nationwide application of the results standard desirable to avoid the risk of stigmatizing certain areas of the country, and to avoid provoking sentiment that such areas "were unjustifiably singled out". 1982 Senate Report at 42, U.S.Code Cong. & Admin.News 1982, p. 220. By eliminating any appearance of regional discrimination, Congress made it more likely that state and local officials will comply with the law. Nationwide application also avoids the administrative difficulties of determining where a statute will apply and where it will not. *Oregon v. Mitchell,* 400 U.S. at 283-84, 91 S.Ct. at 343-44 (Opinion of Steward, J.).

[8] Section 2 therefore meets the first portion of the test laid down in *M'Culloch* and *Ex parte Virginia:* it is clearly an "appropriate" means for carrying out the goals of the Civil War Amendments. Nor is the results test prohibited by any other part of the Constitution. The defendants argue that section 2 is an impermissible infringement on state powers. But section 2 is far less of an interference with state powers than the preclearance provisions approved in *South Carolina v. Katzen-*

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[22] *See generally* S.Rep. No. 295, 94th Cong., 1st Sess. 24-35, *reprinted in* 1975 U.S.Code Cong. & Ad.News 774, 790-802 (discussing need for bilingual voting provisions of Voting Rights Act to protect Hispanic, Asian, and Native American citizens).

bach and *City of Rome.*[23] Nor does section 2 violate states' rights by limiting their choices of electoral processes. Section 2 leaves state and local governments free to choose the election system best suited to their needs, as long as that system provides equal opportunities for effective participation by racial and language minorities.[24]

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[23] Preclearance has not always been effective, largely because covered jurisdictions have frequently overlooked or ignored their duty under the law to submit voting changes for approval, or have submitted the changes years after they were put into effect. *See* 1982 Senate Report at 11-14. For example, staggered terms were adopted in Marengo County in 1966, but the County's preclearance submission was not completed until April 6, 1978, twelve years after the change was carried out and nearly eight months after the private plaintiffs filed this lawsuit. (When the change was finally submitted, the Attorney General declined to interpose an objection, but noted that this decision was based only on the apparent effect of the 1966 change. The Attorney General made no representations regarding the validity of the 1955 adoption of at-large elections.) *See* Answer of Defendant Marengo County Board of Education, Exhibit A, Record 323-324. Congress has determined that preclearance is too expensive and time-consuming to be enforced effectively on a nationwide basis. *See* 1982 Senate Report at 14-15. Instead, Congress chose to rely on section 2—which does not require automatic review of all voting changes—"to challenge voting discrimination anywhere that it might be proved to occur". *Id.* at 15, U.S.Code Cong. & Admin. News 1982 p. 192.

[24] The results test does *not,* contrary to the arguments of some of its opponents, effectively require jurisdictions to adopt proportional representation. States may retain the perceived benefits of at-large representation while providing opportunities for effective minority participation. A variety of alternatives are available. For example, a board with nine members might have six members elected by districts and three elected at large. *See Mobile v. Bolden,* 446 U.S. at 82, 100 S.Ct. at 1507 (Blackmun, J., concurring). Alternatively, all nine members could be elected at-large, but each voter could be given the right to vote for only five candidates, thus ensuring that minority policial interests would have a chance to elect members to the board. Other alternatives are cumulative voting and transferable preferential voting. *See* Zimmerman, The Federal Voting Rights Act and Alternative Election Systems, 19 Wm. & Mary L.Rev. 621 (1978); Note, *Alternative Voting Systems as Remedies for Unlawful At-Large Systems,* 92 Yale L.J. 144 (1982).

[9] The Civil War Amendments overrode state autonomy apparently embodied in the Tenth and Eleventh Amendments. *EEOC v. Wyoming,* 1983, ____ U.S. ____, ____n. 18, 103 S.Ct. 1054, 1064 n. 18, 75 L.Ed.2d 18, 33 n. 18; *City of Rome,* 446 U.S. at 178-80, 100 S.Ct. at 1562-63; *Fitzpatrick v. Bitzer,* 1976, 427 U.S. 445, 453-56, 96 S.Ct. 2666, 2670-71, 49 L.Ed.2d 614, 620-22. The Civil War Amendments granted national citizenship to all blacks and guaranteed their right of access to the voting process. By their very nature they plainly empowered the federal government to intervene in state and local affairs to protect the rights of minorities newly granted national citizenship. *See City of Rome,* 446 U.S. at 179-80, 100 S.Ct. at 1562-63. "[T]he States can be required to tailor carefully the means of satisfying a legitimate state interest when fundamental liberties and rights are threatened ... and Congress is free to apply the same principle in the exercise of its powers." *Katzenbach v. Morgan,* 384 U.S. at 654 n. 15, 86 S.Ct. at 1725 n. 15. The states have an important interest in determining their election practices. But Congress could reasonably conclude that practices with discriminatory results had to be prohibited to reduce the risk of constitutional violations. Today it is a small thing and not a great intrusion into state autonomy to require the states to live up to their obligation to avoid discriminatory practices in the election process.

The report of the Senate Subcommittee on the Constitution argued that secion 2 was "retroactive" and that such "retroactivity" had never been approved by the Supreme Court. In part II of this opinion we have already explained, however, that theris nothing "retroactive" about section 2. It does not affect the validity of any election conducted before its passage. Section 2 is no more retroactive than were any of the Voting Rights Act provisions approved in previous Supreme Court cases. *South Carolina v. Katzenbach* approved the suspension of literacy tests in covered jurisdictions although some of these tests may have been valid before the passage of the Voting Rights Act of 1965. *See Lassiter v. Northampton Election*

Board, 1959, 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072. *Katzenbach v. Morgan* approved the ban on New York's English-language literacy test as applied to Puerto Ricans, even though that test might have been valid under the standards existing before 1965. The 1970 Voting Rights Amendments similarly banned literacy tests, residency requirements, and age limits, many of which were unquestionably valid before the Act was passed. In *Oregon v. Mitchell* the Court approved all the 1970 Amendments except the age limits as applied to state and local elections; its disapproval of the age provision had nothing to do with "retroactivity".

The Senate Subcommittee on the Constitution also argued that the results test is unconstitutional because it "is offensive to the basic colorblind objectives of the Constitution". 1982 Senate Report at 172, U.S. Code Lcong. & Admin.News 1982, p. 345. The Subcommittee argued taht under the results test, "[c]onsiderations of race and color would become omnipresent and dominant". *Id.* at 173, U.S.Code Cong. & Admin.News 1982, p. 346. This is an argument of policy, not one of constitutionality. The Senate Report responds to the Subcommittee's concerns by noting that section 2 is intended to apply only where racial politics already "dominate[s] the electorial process". *Id.* at 33, U.S. Code Cong. & Admin. News 1982, p. 211. Section 2 is not meant to create race-conscious voting but to attack the discriminatory results of such voting where it is present.

[10] The defendants argue, as did the Senate Subcommittee on the Constitution, that section 2 is an impermissible effort to overturn the Supreme Court's interpretation of the Constitution in *Mobile v. Bolden.* The opponents of section 2 argue that it is not an exercise of the enforcement power but an effort to redefine the meaning of the Civil War Amendments by statute. There is no doubt that Congress amended section 2 principally because congress was dissatisfied with the effect of *Mobile v. Bolden* on voting rights litigation. The Senate Report says so

explicitly.[25] This is to be expected; had the Supreme Court not adopted an intent requirement in *Mobile v. Bolden,* the statutory amendment would have been unnecessary. But congressional disapproval of a Supreme Court decision does not impair the power of Congress to legislate a different result, as long as Congress had that power in the first place. The amendment to section 2 does change the standard that voting rights plaintiffs must meet. But those who argue that this change is tantamount to overruling *Mobile v. Bolden* miss the point of that case. That case held that direct violations of the substantive provisions of the Fourteenth and Fifteenth Amendments—that is, the provisions not amenable to statutory change—are established only when discriminatory purpose is shown. The Court also held that the Voting Rights Act, as then written, did not impose a different standard from that of the Constitution. But nothing in *Mobile v. Bolden* suggested that Congress could not prohibit by statute what the Court had declined to forbid under the Constitution.[26] *City of Rome,* decided the same day, upheld legislation that prohibited

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[25] "In *Bolden,* a plurality of the Supreme Court broke with precedent andsubstantially increased the burden on plaintiffs in voting discrimination cases by requiring proof of discriminatory purpose. The Committee has concluded that this intent test places an unacceptably difficult burden on plaintiffs. It diverts the judicial injury [sic] from the crucial question of whether minorities have equal access to the electoral process to a historical question of individual motives.

> "In our view, proof of discriminatory purpose should not be aprerequisite to establishing a violation of Section 2 of the Voting Rights Act."

1982 Senate Report at 16, U.S.Code Cong. & Admin.News 1982, p. 193; *see also id.* at 36-37.

[26] Indeed, the plurality took pains to determine whether section 2 as it then stood, added anything to the plaintiffs' case, even though the lower courts had not separately considered the statutory cause of action. 446 U.S. at 60-61, 100 S.Ct. at 1495-1496 (Opinion of Stewart, J.).

discriminatory effects. It may well be that *Mobile v. Bolden* should be understood as an invitation by the Court to Congress to supplement the Constitution's fundamental, self-enforcing prohibition of purposeful discrimination. Basic to a governmental system resting on separation of powers is the power of Congress to go beyond the explicit provisions of the Constitution and to take steps taht the courts are reluctant to take in the absence of legislation. *M'Culloch v. Maryland,* 1819, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579. The rule of *Mobile v. Bolden* is not that discrimination can be prohibited only if it is purposeful. It is rather that the courts, acting without statutory guidance, will go no further than to strike down purposeful discrimination. It is for Congress to decide how much further to go in fulfilling the goals of the Constitution. Congress has done so.

[11] In enacting the results test of section 2 Congress did not rely on, or even mention, any power to interpret the Constitution or to decide independently of the judiciary that certain practices directly violate the substantive provisions of the Constitution. We therefore need not consider any argument that Congress has such power, nor need we consider the limits on such a power.[27] Congress predicated its power to amend section

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[27] Because Congress did not rely on any power to interpret the Constitution, we need not become embroiled in the heated dispute concerning the existence and extent of that power. *See* Buchanan, *Katzenbach v. Morgan and Congressional Enforcement Power Under the Fourteenth Amendment: A Study in Conceptual Confusion,* 17 Hous.L.Rev. 69 (1979); Burt, *Miranda and Title II: A Morganatic Marriage,* 1969 Sup.Ct. Rev. 81; Cohen, *Congressional Power to Interpret Due Process and Equal Protection,* 27 Stan. L.Rev. 603 (1975); Cox, *The Role of Congress in Constitutional Determinations,* 40 U.Cin.L.Rev. 199 (1971). Furthermore, there is a crucial difference between the Voting Rights Act and the proposals to ban abortion or school busing be statute, referred to by the opponents of section 2, *see, e.g.,* 1982 Senate Report at 171 n. 23, 184 (Subcommittee Report). The Voting Rights Act does not conflict with any provision of the Constitution that protects individual rights from impairment by

2 squarely, and only, upon the enforcement power. 1982 Senate Report at 39-43. Nothing more isnecessary to sustain the statute. Section 2 does not conflict with or contract any right protected by the Constitution, and nothing in the Constitution either explicitly or implicitly prohibits a results standard for voting rights violations. Under the test of *M'Culloch,* section 2 is "consist[ent] with the letter and spirit of the constitution", 17 U.S. (4 Wheat.) at 421, and is clearly constitutional. *Accord Jones v. City of Lubbock,* 5 Cir.1984, 727 F.2d 364, 372-75; *Major v. Treen,* 1983, E.D.La., 574 F.Supp. 325, 342-49 (3 judge court).

V.

The United States urges us, on the basis of the record now before us, to hold as a matter of law that Marengo County's at-large election system has a discriminatory result and violates amended section 2. We do not do so, for the reasons explained in part VI of this opinion. At the trial, the district court's ultimate inquiry in this case was whether the plaintiffs had demonstrated discriminatory intent. 469 F.Supp. at 1178, 1180. Certain language in the district court's opinion, however, indicates that the court also held that Marengo County's at-large system is not responsible for any lack of minority access to the political system and would therefore pass muster under a results or effects test as well. The court stated that it was "convinced that the lack of black success in Marengo County elections results not from a lack of access to the political system, but rather from a failure of the blacks to turn out as many of their

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Congress and the states. The only interests that section 2 arguably impairs are the states' interests in adopting electoral practices that have a discriminatory result. Such a state interes tis a contradiction in terms. As this opinion explains elsewhere, section 2 is not unconstitutional on states' rights grounds.

half of the voters as do the whites". 469 F.Supp. at 1161 n. 7. The court also stated that "it is clear that if the blacks could overcome voter apathy and turn out their votes, they could succeed in spite of polarization". *Id.* at 1163. These findings are based on a misconception of law and are clearly erroneous. To ensure that upon remand this case is decided under correct legal standards, we find it necessary to explain in some detail how the "results" test of section 2 is to be applied to an allegation that an at-large system unlawfully dilutes minority votes.

A.

Congress chose the language of the statute with great care. Congress wished to eliminate any intent requirement from section 2, and therefore changed the terms of § 2(a), 42 U.S.C.A. § 1973(a) (West Supp. 1983), to forbid any practice that "results in" discrimination. Congress used the word "results" to make clear that the section 2 standard was not intended to be equivalent to the "effects" test of the preclearance provisions of section 5. 1982 Senate Report at 68. In section 2(b), 42 U.S.C.A. § 1973(b) (West Supp.1983), violations of subsection (a) are defined in language taken from *White v. Regester,* 1973, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314. In *White* the Court stated that in a dilution case the plaintiffs could not succeed merely by showing that racial groups were not represented in proportion to their voting potential:

> "The plaintiffs' burden is to produce evidence supporting findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the policial processes and to elect legislators of their choice."

412 U.S. at 766, 93 S.Ct. at 2339. The language of *White*, generalized to cover all elections and elected officials, is the fundamental standard of section 2. But Congress added a further provision to make certain that proportional representation is not required. As amended, section 2 now reads:

> "(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f))2) of this title, as provided in subsection (b) of this section.
>
> "(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that thpolitical processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."

42 U.S.C.A. § 1973 (West Supp.1983).[28]

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[28] The original statute read simply,

> "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color."

[12-15] The language and history of the statute make clear several points. First, discriminatory intent need not be shown to establish a violation.[29] Second, at-large elections are not prohibited per se, nor does a lack of proportional representation

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Pub.L. No. 89-110, § 2, 79 Stat. 437, 437 (1965). The reference to 42 U.S.C. § 1973b(f)(2) was added in 1975, when Congress expanded the Voting Rights Act to include minority language groups. Pub.L. No. 94-73, sec. 206, 89 Stat. 400, 402 (1975).

[29] As stated, the language of section 2 is taken from *White v. Regester*. In *Mobile v. Bolden* the plurality interpreted *White* as requiring a showing of discriminatory intent. 446 U.S. at 66, 68-70, 100 S.Ct. at 1499, 1500-1501. Several legislators therefore argued that section 2 does contain an intent requirement. *See, e.g.*, Senate Report at 104 n. 24, (Additional Views of Sen. Hatch); *id.* at 189-93 (Additional Views of Sen. Laxalt); *id.* at 236-37 (Minority Views of Sen East); 128 Cong.Rec. H3844-45 (daily ed. June 23, 1982) (statement of Rep. Lungren). The statute and the committee reports, however, could not be clearer. After the House had adopted a version of section 2 that some legislators feared would mandate proportional representation, Senator Dole, along with Senators Kennedy and Mathias, proposed the "compromise" language that was eventually enacted. *See* 1982 Senate Report at 3-4, 75. That language explicitly adopts a "results" test, and nowhere calls for any consideration of intent. The Senate Report emphasizes in the strongest possible terms that section 2 contains no intent requirement. *E.g., id.* at 2, 15-39, 67-68; *see also id.* at 88 (Additional Views of Senator Thurmond); *id.* at 193-195 (Additional Views of Senator Dole). The floor debates are equally clear on this point. *See, e.g.*, 128 LCong.Rec. S6930-31 (daily ed. June 17, 1982 (statement of Sen. DeConcini); *id.* S6941-44 (statement of Sen. Mathias); *id.* S6956-65 (debate concerning proposed amendment to restore intent test; the Senate rejected this amendment 81-16); *id.* S6995-96 (colloquy of Sen. Kennedy and Sen. Stevens); *id.* S7095 (daily ed. June 18, 1982) (statement of Sen. Kennedy); *id.* S7119 (statement of Sen. Dole); *id.* S7138 (Statement of Sen. Robert Byrd); *id.* H3841 (daily ed. June 23, 1982) (statement of Rep. Sensenbrenner). *Accord Jones v. City of Lubbock*, 727 F.2d at 378-80; *Velasquez v. City of Abilene*, 5 Cir.1984, 725 F.2d 1017, 1023.

automatically require a finding of a violation. At the same time, however, the absence of minority elected officials may be considered as an indicium of violation, and an at-large system will violate the statute *if* it results in a denial of equal participation.[30] Congress noted that some at-large systems diluted black votes, and would be vulnerable under the amended statute. 1982 Senate Report at 6. Third, section 2 focuses not on whether minority groups receive adequate public services but on whether minorities have an equal right to *participate* in the political process. *See id.* at 36.

The Senate Report gives particular approval to the jurisprudence developed by the former Fifth Circuit in cases immediately following *White v. Regester,* most notably *Zimmer v. McKeithen,* 5 Cir.1973, 485 F.2d 1297 (en banc), *aff'd per curiam sub nom. East Carroll Prish School Board v. Marshall,* 1976, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296. *Zimmer* listed a number of factors to be considered in dilution cases.[31]

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[30] The principal purpose of the compromise language offered by Senators Dole, Kennedy, and Mathias was to make clear that although a lack of proportional representation may be considered, section 2 does not *require* proportional representation. *See, e.g.,* 1982 Senate Report at 30-35; *id.* at 88 (Additional Views of Sen. Thurmond); *id.* at 193-94 (Additional Views of Sen. Dole); *id.* at 196-99 (Additional Views of Sen. Grassley); 128 Cong.Rec. S6717-18 (daily ed. June 14, 1982) (colloquy of Sen. Tower and Sen. Moynihan); *id.* S6778 (daily ed. June 15, 1982) (statement of Sen. Specter); *id.* S6962 (daily ed. June 17, 1982 (colloquy of Sen. Thurmond and Sen. Dole); *id* S7118-19 (daily ed. June 18, 1982)(Statement of Sen. Thurmond); *id.* S7119 (statement of Sen. Dole). The Committee on the Judiciary rejected amendments that would have prohibited the courts from considering the existence of an at-large election system as evidence of a section 2 violation. 1982 Senate Report at 4. It is clear that an at-large system may violate section 2. *See* part III of this opinion.

[31] "Clearly, it is not enough to prove a mere disparity between the number of minority residents and the number of minority representatives. Where it is apparent that a minority is afforded the opportunity to participate in the seating of candidates to represent its area, that the representatives seated and elected

The Senate Report repeats and elaborates on this list, characterizing them as "typical factors".[32] These factors are to

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provide representation responsive to minority's needs, and that the use of a multi-member districting scheme is rooted in a strong state policy divorced from the maintenance of racial discrimination, *Whitcomb v. Chavis,* [1971, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363,] would require a holding of no dilution. *Whitcomb* would not be controlling, however, where the state policy favoring multi-member or at-large districting schemes is rooted in racial discrimination. Conversely, where a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts. The fact of dilution is established upon proof of the existence of an aggregate of these factors. The Supreme Court's recent pronouncement in *White v. Regester, supra,* demonstrates, however, that all these factors need not be proved in order to obtain relief."

485 F.2d at 1305 (footnotes omitted).

[32] "Typical factors include:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

be weighed under a "totality of the circumstances" approach.[33]

We organize our review of those findings in the same way. We emphasize, however, that the *Zimmer* factors serve a different purpose in litigation under section 2 from their purpose in constitutional litigation.

> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
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> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. whether political campaigns have been characterized by overt or subtle racial appeals;
>
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.
>
> "Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:
>
> whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.
>
> whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.
>
> "While these enumerated factors will often be the most relevant ones in some cases other factors will be indicative of the alleged dilution."

1982 Senate Report at 28-29 (footnotes omitted), U.S.Code Cong. & Admin.News 1982, pp. 206-207. Like the Senate Report, we do not preclude the possibility that factors other than those enumerated in *Zimmer* may be relevant in an appropriate case.

[33] "The cases demonstrate, and the Committee intends that there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other."

1982 Senate Report at 29, U.S.Code Cong. & Admin.News 1982, p. 207.

B.

In this section we list the factors considered by the district court and explain the relevance, under amended section 2, of these factors and of the district court's findings. We take them in a somewhat different order from that of the district court because of the different emphasis placed on different factors by the results test.

Racially polarized voting

The statute explicitly calls for a "totality-of-the circumstances" approach and the Senate Report indicates that no particular factor is an indispensable element of a dilution claim. 1982 Senate Report at 28-30. We therefore do not hold that a dilution claim cannot be made out in the absence of racially polarized voting. But the legislative history indicates that this factor will ordinarily be the keystone of a dillution case.

To some extent the significance of racially polarized voting is obvious. "[I]n the absence of racially polarized voting, black candidates could not be denied office because they were black, and a case of . . . dilution could not be made." *Nevett v. Sides,* 5 Cir. 1978, 571 F.2d 209, 223 n. 16, *cert. denied,* 1980, 446 U.S. 951, 100 S.Ct. 2916, 64 L.Ed.2d 807; *see also Rogers v. Lodge,* 458 U.S. at 623-24, 102 S.Ct. at 3279. The importance of polarized voting to a plaintiff's case also grows out of the purposes of amended section 2 and the limits placed upon its scope. The report of the Senate Subcommittee on the Constitution argued that a results test would create race-consciousness and racial polarization. The Subcommittee also argued that the results test made the unwarranted assumptions "that race is the predominant determinant of political preference" and "that the decisions of elected officials are predominantly determined by racial classification". 1982 Senate Report at 148-49, U.S. Code Cong. & Admin.News 1982, p. 321. The majority report responded:

"The Subcommittee Report claims that the results test assumes 'that race is the predominant determinant of political preference.' The Subcommittee Report notes that in many cases racial bloc voting is not so monolithic, and that minority voters do receive substantial support from white voters.

"That statement is correct, but misses the point. It is true with respect to most communities, and in those communities it would be exceedingly difficult for plaintiffs to show that they were effectively excluded from fair access to the political process under the results test.

"Unfortunately, however, there still are some communities in our Nation where racial politics do dominate the electoral process.

"In the context of such racial bloc voting, and other factors, a particular election method can deny minority voters equal opportunity to participate meaningfully in elections.

* * * * * * * *

"The results test makes no assumptions one way or the other about the role of racial political considerations in a particular community. If plaintiffs assert that they are denied fair access to the political process, in part, because of the racial bloc voting context within which the challenged election system works, they would have to prove it."

Id. at 33-34 (footnote and italization omitted), U.S.Code Cong. & Admin.News 1982, pp. 211-12.

This section of the Senate Report makes it clear that section 2 is intended not to create race-conscious politics, but to remedy it where it already exists. The surest indication of race-conscious politics is a pattern of racially polarized voting.

In the present case the defendants argue that an elected official does not "have to be of a particular race to adequately represent that race". Brief for the Appellees at 30. We com-

pletely agree with this statement and look hopefully toward the day when elections in Marengo County are conducted without regard to the race of the candidates. But the evidence demonstrates that day has not come, at least as of 1978. The district court found extremely strong evidence of polarized voting in elections before 1978, and continuing, through somewhat reduced, polarization in the 1978 elections.[34] Race is, as it has been since blacks were allowed to vote, the main issue in Marengo County politics.[35]

Past discrimination and its lingering effects

A history of discrimination is important evidence of both discriminatory intent and discriminatory results. A history of pervasive purposeful discrimination may provide strong circumstantial evidence that the present-day acts of elected officials are motivated by the same purpose, or by a desire to perpetuate the effects of that discrimination. *Rogers v. Lodge,*

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[34] The plaintiffs in this case proved polarization through direct statistical analysis of the vote returns. We have stated that "[b]loc voting may [also] be indicated by a showing under *Zimmer* of . . . past discrimination in general . . ., large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographic subdistricts", or by "the consistent lack of success of qualified black candidates". *Nevett,* 571 F.2d at 223 n. 18. *See also Jones v. City of Lubbock,* 5 Cir. 1984, 730 F.2d 233-36 (Higginbotham, J., concurring).

[35] In addition to the strong statistical evidence, evidence of racial polarization in Marengo County may be gleaned from, for example, the school board's primary concern with placating whites, *see* 469 F.Supp. at 1170, and from the district court's observations in *Lee v. Marengo County Board of Education,* 1978, S.D.Ala., 454 F.Supp. 918, *rev'd and remanded,* 5 Cir. 1979, 588 F.2d 1134, *cert. denied,* 1979, 444 U.S. 830, 100 S.Ct. 57, 62 L.Ed.2d 38. In that school desegregation opinion, the court expressed serious doubts that Marengo County whites would attend desegregated black majority schools. 454 F.Supp. at 931 n. 20, 934. Such attitudes are strong circumstantial evidence that race continues to dominate politics in Marengo County.

458 U.S. at 624, 102 S.Ct. at 3279. Under the results test, the inquiry is more direct; past discrimination can severely impair the present-day ability of minorities to participate on an equal footing in the political process. Past discrimination may cause blacks to register or vote in lower numbers than whites. Past discrimination may also lead to present socioeconomic disadvantages, which in turn can reduce participation and influence in political affairs.[36] *See Zimmer,* 485 F.2d at 1306.

The historical record of discrimination in Marengo County is undisputed, and it has not ended even now. The county school system remains under judicial supervision; and in 1978, while this case was being tried, the district court characterized the Board of Education as "obdurately obstinate" in its opposition to desegregation. *Lee v. Marengo County Board of Education,* 1978 S.D.Ala., 454 F.Supp. 918, 931. The judicial opinions recording the efforts of the United States and private plaintiffs to desegregate the public schools of this small rural county would fill a small volume.[37] Federal courts had to intervene to

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[36] The district court assumed that the history of private discrimination in Marengo County is irrelevant to this case. 469 F.Supp. at 1173 n. 32. But under the results standard of section 2, pervasive private discrimination should be considered, because such discrimination can contribute to the inability of blacks to assert their political influence and to participate equally in public life. *See Major v. Treen,* 1983, E.D.La., 574 F.Supp. 325, 341 (3 judge court).

[37] *See Lee v. Marengo County Board of Education,* M.D.Ala., 267 F.Supp. 458 (3 judge court) *aff'd mem. per curiam sub nom. Wallace v. United States,* 1967, 389 U.S. 215, 88 S.Ct. 415, 19 L.Ed.2d 42; *Lee v. Macon County Board of Education,* 5 Cir. 1972, 465 F.2d 369; *Lee v. Marengo County Board of Education,* 1978, S.D.Ala., 454 F.Supp. 918, *rev'd and remanded,* 5 Cir. 1979, 588 F.2d 1134, *cert. denied,* 1979, 444 U.S. 830, 100 S.Ct. 57, 62 L.Ed.2d 38; *Lee v. Linden City School System,* 5 Cir. 1980, 617 F.2d 383; *Lee v. Demopolis City School System,* 5 Cir. 1977, 557 F.2d 1053, *cert. denied,* 1978, 434 U.S. 1014, 98 S.Ct. 729, 54 L.Ed.2d 758. The record also contains more than a dozen unpublished opinions in the school desegregation case. Record 58, 61-194.

end discrimination on Marengo County's grand and petit juries. *Black v. Curb,* 5 Cir. 1970, 422 F.2d656. And, of course, a long series of lawsuits was necessary to enforce the rights of blacks in Marengo County to vote and run as candidates.[38] This is not to mention cases of statewide application too numerous to list completely. For example, in *Alabama State Teachers Ass'n v. Lowndes County Board of Education,* 1968, M.D.Ala., 289 F.Supp. 300 (3 judge court) the court struck down a series of statutes that denied tenure to teachers in predominantly black counties, including Marengo. The district court opinion lists many other cases of statewide application. 469 F.Supp. at 1172-73.

The district court acknowledged this history of discrimination, but then stated that the plaintiffs had "adduced very little evidence" as to "whether such past discrimination has in any way precluded effective present participation by blacks", *id.* at 1173, and concluded that the "present lingering effects of past discrimination among blacks...do not manifest themselves so completely in political matters as they do in other everyday affairs", *id.* at 1180.

The district court concluded that past discrimination does not substantially impair the ability of blacks to participate in the political process. The record fails to support this conclusion. Because blacks are poorer and less educated they have less political influence than whites. Blacks still register and vote in significantly lower numbers than whites. The district court was well aware of this fact but attributed the absence of elected black officials to "voter apathy" and "a failure of blacks to

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[38] *See United States v. Elsberry,* S.D.Ala., No. 3791-65; *United States v. Marengo County,* S.D.Ala., No. 1567; *United States v. Executive Committee of the Democratic Party of Greene County,* 1966, S.D.Ala., 254 F.Supp. 543; *Hadnott v. Amos,* 1970, M.D.Ala., 320 F.Supp. 107 (3 judge court), *aff'd mem.,* 1971, 401 U.S. 968, 91 S.Ct. 1189, 28 L.Ed.2d 318, *and* 1972, 405 U.S. 1035, 92 S.Ct. 1304, 31 L.Ed.2d 576.

turn out their votes". *Id.* at 1163. Reasoning that as of 1978 there were an estimated 7,040 black voters, and that the winners of most previous elections had received 5,000 - 6,000 votes, the court speculated that "if the blacks could overcome voter apathy and turn out their votes, they could succeed in spite of polarization". *Id.*

Both Congress and the courts have rejoined efforts to blame reduced black participation on "apathy". The Senate Report states,

> "The courts have recognized that disproportionate educational[,] employment, income level[,] and living conditions arising from past discrimination tend to depress minority political participation ... Where these conditions are shown, and where the level of black participation is depressed, plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation."

1982 Senate Report at 29 n. 114. *See also Major v. Treen,* 1938, E.D.La., 574 F.Supp. 325, 351 n. 31.

This Court has rejected the speculation the district court offered. In *Kirksey v. Board of Supervisors of Hinds County,* 5 Cir. 1977, 554 F.2d 139 (en banc), *cert. denied,* 1977, 434 U.S. 1968, 98 S.Ct. 512, 54 L.Ed.2d 454, the district court approved a redistricting plan that cut up the black community and left it a minority in each of the five voting districts. The district court held that this plan gave blacks a "realistic opportunity" of winning elections in two districts where blacks were 48-49% of the voting age population. *Id.* at 150. The Court of Appeals rejected this approach. It held: "The responsibility of the defendants to permit minority voters a proper role in democratic political life must be discharged by stronger stuff than gossamer possibilities of all variables falling into place and leaning in the same direction." *Id.*

The Fifth Circuit also established that when there is clear evidence of present socioeconomic or political disadvantage resulting from past discrimination, as there was in this case, the burden is not on the plaintiffs to prove that this disadvantage is causing reduced political participation, but rather is on those who deny the causal nexus to show that the cause is something else. *Cross v. Baxter,* 5 Cir. 1979, 604 F.2d 875, 881-82; *Kirksey,* 554 F.2d at 144-46; *Zimmer,* 485 F.2d at 1306; *see also Hartman,* 50 Geo.Wash.L.Rev. at 727-29. There was certainly no substantial evidence in the present case to support an attribution of depressed black political participation to "apathy" unconnected with historical discrimination.[39]

Access to the slating process

In jurisdictions where there is an influential official or unofficial slating organization, the ability of minorities to participate in that slating organization and to receive its endorsement may be of paramount importance. In *White v. Regester,* for example, the Supreme Court found it significant that only two blacks had ever been endorsed by the Dallas County Committee for Responsible Government, "a white-dominated organization that is in effective control of Democratic Party candidate slating in Dallas County". 412 U.S. at 766-67, 93 S.Ct. at 2339-40. Apparently, there was no similar organization in Marengo County. The district court did not directly address the question whether there was a more informal slating process that ensured a white candidate for every office. In the broadest sense of the term "access to slating"—that is, the ability to run for office—there

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[39] The district court cited *Nevett v. Sides* as authority for its conclusion that apathy, not polarized voting, was responsible for the consistent failure of blacks to win election. There is a critical difference between *Nevett* and this case, however: in *Nevett,* 6 of 7 black candidates *won* in the 1968 election, although none won in 1972. 571 F.2d at 214. It was therefore far from obvious in 1976, when the case was tried, that the at-large system prevented blacks from participating in the political process. 571 F.2d at 227.

does not appear to have been any substantial formal or informal impediment to black candidates. We do note, however, that in 1978 only 7 of the 34 members of the Marengo County Democratic Executive Committee were black. 469 F.Supp. at 1162 n. 10.[40]

Election practices

Two election practices exacerbated the deficiencies in black participation: the low number of black poll officials and the failure of the register to abide by state law. The district court stated,

> "On the poll official appointment question, the plaintiffs allege that the appointments made by the County Appointing Authority have been racially motivated and tend toward tokenism. They contend that it is important to have black poll officials so that black voters will have more confidence in the electoral system. The evidence before the Court reflects that the assertions of the plaintiffs are to a large extent true. . . . [O]ne black was appointed at each polling place for the 1970 election, and there is no evidence that this number has increased to any great extent."

469 F.Supp. at 1161 (footnote omitted.)[41] The court concluded, however, "that this inequity is not of such magnitude as to deprive blacks of access to the political process." *Id.* at 1162 (footnote omitted).

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[40] Minority candidates may also be denied effective access to the slating process if racial discrimination prevents them from actively seeking white votes and support. *See Perkins v. City of West Helena,* 8 Cir. 1982, 675 F.2d 201, 209-10.

[41] Under Ala.Code § 17-6-1 (1975 & Supp. 1983) poll officials are appointed by a County Appointing Authority comprised of the probate judge, sheriff, and circuit court clerk.

The plaintiffs also showed that the County Board of Registrars was open only two days a month except in election years; that, contrary to state law, the Board of Registrars met only in Linden, the county seat, and failed to visit outlying areas to register rural voters[42], and that the Board had never acted on the offer of a black, Earnest Palmer, to serve as a deputy registrar.[43] The court said it did not see how these policies discriminated against blacks. *Id.* at 1164.

These policies, however, unquestionably discriminated against blacks because fewer blacks were registered. If blacks are to take their rightful place as equal participants in the political process, affirmative efforts were and are necessary to register voters and to assist those who need assistance.[44] By holding short hours the Board made it harder for unregistered voters, more of whom are black than white, to register. By meeting only in Linden the Board was less accessible to eligible rural voters, who were more black than white. By having few black poll officials and spurning the voluntary offer of a black

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[42] Until 1978, the board of registrars was required to "visit each precinct at least once and more often if necessary between October 1 and December 31 of each odd-numbered year to make a complete registration of all persons entitled to register, and shall remain there at least one half a day". Ala.Code § 17-4-1 (1975) (repealed by Act of April 27, 1978, No. 584, § 34, 1978 Ala.Acts 667, 677). Under the new law, Ala.Code § 17-4-156(f) (Supp. 1983), the board is authorized to hold special registration sessions away from the courthouse.

[43] Under Ala.Code § 17-4-158 (Supp.1983), enacted in 1978, the board of registrars may appoint deputy registrars to serve without compensation.

[44] *See generally* Note *Eradicating Racial Discrimination in Voter Registration: Rights and Remedies Under the Voting Rights Act Amendments of 1982,* 52 Fordham L.Rev. 93 (1983).

citizen to serve as a registrar, county officials impaired black access to the political system and the confidence of blacks in the system's openness. *See United States v. Palmer,* 5 Cir. 1966, 356 F.2d 951, 952.

Enhancing factors

[16] A vote dilution case "is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts". *Zimmer,* 485 F.2d at 1305. Marengo County has a majority vote requirement in the Democratic Party primary, although not in the general election. 469 F.Supp. at 1174. Candidates for the School Board and County Commission run for specific posts, based on residency districts except for the presiding officers' positions. Marengo County has a small population but a large, rural area, and accordingly the county-wide campaign for an at-large position is expensive. Since blacks earn, on the average, less than half of the amount that whites earn, the district court correctly found that the size of the county contributes to dilution. On balance, the features of the electoral system operate, although they do provide for some geographical diversity.[45] This geographic diversity, however, does not operate to reduce *racial* dilution, because the white majority still elects whites to represent all the residency districts.[46]

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[45] Marengo County has no anti-single shot law. When voters can cast more than one vote in the same race, an anti-single shot provision can force minority voters to vote for majority candidates. *Nevett,* 571 F.2d at 217 n. 10. As the district court correctly found here, such a provision is irrelevant when candidates run for specific positions. 469 F.Supp. at 1175.

[46] The exception is Moses Lofton, a black who was appointed to represent the southeast district on the School Board.

Racial appeals

[17] The court found no evidence of overt or subtle racial appeals, and placed little credence in evidence offered to show that black voters were intimidated. In the seventies overtly political racism was less prevalent than in the sixties. "As overtly bigoted behavior has become more unfashionable, evidence of intent has become harder to find." *Metropolition Housing Development Corp. v. Village of Arlington Heights,* 7 Cir.1977, 558 F.2d 1283, 1290, *cert. denied,* 1978, 434 U.S. 1025, 98 S.Ct. 752, 54 L.Ed.2d 772. But the continuing effects of past discrimination are still with us. This is one of the principal reasons Congress found it necessary to adopt a results test to root out the effects of past discrimination. 1982 Senate Report at 36-37; *Major v. Treen,* 574 F.Supp. at 346. Evidence of racism can be very significant if it is present. *See Perkins v. City of West Helena,* 675 F.2d at 216-17. But its absence should not weigh heavily against a plaintiff proceeding under the results test of section 2.

State policy

[18, 19] Under an intent test, a strong state policy in favor of at-large elections, for reasons other than race, is evidence that the at-large system does not have a discriminatory intent. On the other hand, a tenuous explanation for at-large elections is circumstantial evidence that the system is motivated by discriminatory purposes. *See Robinson v. Commissioners Court,* 5 Cir.1974, 505 F.2d 674, 680; *Zimmer,* 485 F.2d at 1305, 1307. State policy is less important under the results test: "even a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process". 1982 Senate Report at 29 n. 117, U.S.Code Cong. & Admin.News 1982, p. 207, n. 117. But state policy is still relevant insofar as intent is relevant to result: evidence that a voting device was intended to discriminate is cir-

cumstantial evidence that the device has a discriminatory result. *See Major v. Treen,* 574 F.Supp. at 354-55. Moreover, the tenuousness of the justification for a state policy is unfair. *Hendrix v. Joseph,* 5 Cir.1977, 559 F.2d 1265, 1269-70.

The district court found that there was no strong state policy either for or against at-large elections. The court erroneously stated that Marengo County's at-large provisions were adopted "in 1923 and 1935 when blacks has been effectively disenfranchised" and therefore those provisions could not have been motivated by race. In fact, at-large elections were adopted in 1955, just after the Supreme Court decided *Brown v. Board of Education,* 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873. It is fair to infer that at-large elections were enacted in direct response to the prospect of increased black political participation.

Success of minority candidates

[20] If members of the minority group have not been elected to public office, it is of course evidence of vote dilution. Section 2(b) explicitly permits the court to consider "[t]he exent to which members of a protected class have been elected", but in the next breath warns that the statute does not establish a right to proportional representation. 42 U.S.C.A. § 1973(b) (West Supp. 1983). The Senate Report states that this disclaimer was intended to incorporate certain judicial precedents rejecting racial quotas. 1982 Senate Report at 30-31. Less than proportional representation clearly does not automatically violate section 2. But it is equally clear that the election of one or a small number of minority elected officials will not compel a finding of no dilution. *Id.* at 29 n. 115. "Such success might, on occasion, be attributable to the work of politicans, who, apprehending that the support of a black candidate would be politically expedient, campaign to insure his election. Or such success might be attributable to political support motivated by different considerations—namely that election of a black candidate will thwart successful challenges to electoral schemes on dilution

grounds." *Zimmer,* 485 F.2d at 1307. *See also National Association for the Advancement of Colored People v. Gadsden County School Board,* 11 Cir.1982, 691 F.2d 978, 983.

The record shows, as of 1978, that *no* black had ever been elected to either the School Board of the County Commission. One had been *appointed* to the school board, but the warning of *Zimmer,* quoted above, is particularly appropriate to such an appointment. The appointment of one black to the School Board, while it may have demonstrated an increased willingness of Marengo County whites to allow black individuals to participate, certainly does not demonstrate the ability of black voters to elect officials.[47] One other black was elected, to the post of County Coroner. These were the only black candidacies. This evidence can be interpreted only as strong evidence of dilution. The district court's conclusion that this nearly complete lack of success did not indicate a lack of effective access to the system, 469 F.Supp. at 1161, is clearly erroneous.

Unresponsiveness

Under an intent test the responsiveness of elected officials to minority needs is an important factor. If the officials are unresponsive it suggests that they are willing to discriminate against minorities and need not be accountable to minority interests. *Rogers v. Lodge,* 458 U.S. at 625 & n. 9, 102 S.Ct. at 3280 & n. 9.

Unresponsiveness is considerably less important under the results test. A panel of this Court had concluded that responsiveness "has nothing to do with [discriminatory] impact". *NAACP v. Gadsden County,* 691 F.2d at 983. Other authorities suggest that unresponsiveness does have some relevance in a section 2 case. If minority needs are not served it is evidence that minorities have insufficient political influence to ensure that their desires are considered by those in power. *See Hendrix,* 559

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[47] Neither would his subsequent *unopposed* reelection.

F.2d at 1268-69; *Kirksey,* 554 F.2d at 143-467. But unresponsiveness is of limited importance under section 2 for two reasons. First, section 2 protects the access of minorities not simply to the fruits of government but to participation in the process itself. Accordingly, evidence that officials meet the functional needs of minority citizens does not overcome evidence that the minorities are excluded from political participation. Second, responsiveness is a highly subjective matter, and this subjectivity is at odds with the emphasis of section 2 on objective factors. The Senate Report states that "defendants; proof of some responsiveness would not negate plaintiff's showing by other, more objective factors enumerated here that minority voters nevertheless were shut out of equal access to the political process". 1982 Senate Report at 29 n. 116, U.S.Code Cong. & Admin.News 1982, p. 207, n. 116. The authors of the Senate Report apparently comtemplated that unresponsiveness would be relevant only if the plaintiff close to make it so,[48] and that although a showing of unresponsiveness might have some probative value a showing of responsiveness would have very little.

The district court discussed responsiveness extensively, and concluded that there was no "substanial lack of responsiveness". This conclusion would not weigh heavily against a finding of dilution, and in any event it is not borne out by the evidence. The record shows that the government authorities—especially the School Board and the Board of Registrars[49]—were considerably less responsive to black in-

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[48] "However, should plaintiff choose to offer evidence of unresponsiveness, then the defendant could offer rebuttal evidence of its responsiveness." 1982 Senate Report at 19 n. 116, U.S.Code Cong. & Admin.News 1982, p. 207, n. 116.

[49] Although the composition of the Board of Registars is not challenged in this litigation, the Board's unresponsiveness to black needs is important because the Board is directly responsible for voter registration. Its unresponsiveness contributes significantly to the inability of blacks to participate equally in the political process.

terests than one would expect them to be, if blacks had equal acces to the political process. The failure of the registrar to meet its statutory duties and affirmatively to facilitate black registration has been described. The School Board has been intransigent in its opposition to integration of both students and faculty. 469 F.Supp. at 1169-71. The district court noted that the "main objective of the County Board appears to the Court to be to make the system as palatable to whites" [sic]. 469 F.Supp. at 1170. The court's 1978 opinion in the desegregation case reveals the Board's continuing hostility toward integration, to the extent that the Board was still attempting to keep school bus routes segregated. *Lee v. Margengo County Board of Education,* 454 F.Supp. at 937. Still, the district court did not find the School Board "unresponsive" because it did not "feel that any unresponsiveness to black needs has had a serious impact on equal educational opportunities", 469 F.Supp. at 1170. The court stated further than the only unresponsiveness shown was unresponsiveness "to the efforts of the United States Department of Justice", *id.* at 1179, whose "facially neutral desegregation policy . . . in many respects receives no greater support in the black community than it does in the white community", *id.* at 1170.

These conclusions cannot stand. The massive differentials between black and white educational and literacy levels are irrefutable evidence of the effects of the segregated school system on generations of Marengo County's black citizens. The notion that black children might prefer segregated schools, faculties, and bus routes has been rejected since *Brown v. Board of Education.* The court's emphasis on the present quality of education in the schools is misplaced. The Voting Rights Act is concerned with *political* responsiveness. While the Board may finally be providing equal education it has done so only after three decades of resistance, and only because the courts ordered it to do so. Such a Board can hardly be considered "responsive" to the interests of blacks in participating in the affairs of the school system as political equals rather than courtroom adversaries.

The County Commission has a better record. The plaintiffs did not make a strong showing of functional unresponsiveness, but the functions of a county commissioner, in general, "do not easily lend themselves to unresponsive representation". *Zimmer,* 485 F.2d at 1306 n. 26. The district court did not discuss the *political* responsiveness of the commission. The best evidence of this is the racially polarized voting patterns. Responsiveness is an inherently subjective factor and the best judges are the people themselves. The continuing pattern of polarization is therefore strong evidence that the elected officials are not meeting the political needs of Marengo County blacks. *See NAACP v. Gadsden County,* 691 F.2d at 983.

The district court's findings on unresponsiveness are clearly erroneous. We find solid evidence of unresponsiveness on the part of the School Board and the Registrars. The evidence as to the County Commission does not appreciably strengthen the plaintiff's case, but it does not harm it either. To the extent that the evidence on unresponsiveness is relevant, it weighs in favor of a finding of dilution.

C.

[21] The ultimate conclusion under section 2, as under *Zimmer,* is "based on the totality of circumstances". 42 U.S.C.A. § 1973(b) (West Supp.1983). No formula for aggregating the factors applies in every case. Some authorities suggest that a finding of discriminatory result is compelled when the plaintiffs show racially polarized voting combined with an absence of minority elected officials. *See NAACP v. Gadsden County,* 691 F.2d at 982-83; Note, *The Constitutional Significance of the Discriminatory Effects of At-Large Elections,* 91 Yale L.J. 974, 998 (1982). Others have argued that discriminatory effect is irrebutably established when these factors are combined with a history of discrimination and present socioeconomic disparities between the races. *See Blacks United for Lasting Leadership, Inc. v. City of Shreveport,* 5 Cir.1978, 571 F.2d 248, 257

(Wisdom, J., dissenting); Hartman, 50 Geo.Wash.L.Rev. at 729-32. Certainly, when the plaintiffs establish these factors and no other factors weigh strongly against the plaintiff's case, dilution must be found.

In this case the district court found that "apathy", not the at-large election system, was responsible for the lack of black success at the polls. This explanation is unsupported by the evidence and the controlling law. The evidence reveals racially polarized voting; a nearly complete absence of black elected officials; a history of pervasive racial discrimination that has left Marengo County blacks economically, educationally, socially, and politically disadvantaged; polling practices that have impaired the ability of blacks to register and participate actively in the electoral process; election features that enhance the opportunity for dilution; and considerable unresponsiveness on the part of some public bodies. Some of the factors are neutral, but nothing substantial weighs in favor of the defendants. The record compels a finding that, as of the time of trial, Marengo County's at-large system resulted in an abridgement of black citizens' opportunity to participate in the political process and to elect representatives of their choice.

VI.

[22] We hold that the record shows a clear violation of the results test adopted by Congress in section 2 of the Voting Rights Act. The government urges us to render judgment and remand for the devising of a remedy. We must, however, consider the convoluted procedural course this case has taken. It has been more than five years since this case was tried. The ultimate legal theory of the plaitiffs' case has changed, from "intent" to "results", although the same evidence is relevant to both theories. Conditions may have changed in Morengo County, and to devise an appropriate remedy the district court will need to evaluate conditions now rather than the conditions prevailing in 1978.

We note, however, that despite our repeated requests at oral argument, counsel for the defendants did not provide this Court with any sign that would indicate that the political opportunities for Marengo County blacks have improved since 1978.[50] We do not, by our remand, intend that this case experience more of the procedural delays that have plagued it in the past. Accordingly, on remand we suggest to the district court that it not conduct a retrial of any issues already tried and reviewed by this Court. The purpose of the remand is to allow the parties to update the record and to supplement the record with evidence that might tend to affect our finding of discriminatory results. In view of the evidence already in the record, the defendants bear the burden of establishing that circumstances have changed sufficiently to make our finding of discriminatory results in 1978 inapplicable in 1984. The district court shall entertain any evidence, conduct a hearing if necessary, and render new findings, under section 2, within a reasonably prompt time from issuance of our mandate. If a continuing violation is found, the court, of course, will devise an appropriate remedy, bearing in mind the date of the 1984 elections.

We VACATE the district court's finding that the plaintiffs did not establish discriminatory intent.[51] We REVERSE the district court's judgment insofar as it holds that Marengo County's at-large election system did not have a discriminatory result as of the time of trial. We REMAND for further proceedings in accordance with this opinion.

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[50] In fact, it appears that the numerical strength of the black vote has continued to decline. In the 1980 census, Marengo County had a total population of 25,047. Of this number 13,346 (53.2%) were black and 11,663 (46.6%) were white. Of a total voting age population of 16,534, 8,460 (51.2%) were white and 8,045 (48.7%) were black. U.S. Bureau of the Census, *General Population Characteristics, Alabama* p.2-144, Table 45 (1980).

[51] *See* note 10.

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7796

D.C. Docket No. CV78-474-H

United States of America,
Plaintiff-Appellant,

vs.

Marengo County Commission,
et al.,
Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Alabama

Before TJOFLAT and FAY, Circuit Judges, and WISDOM*, Senior Circuit Judge.

Judgment

(Filed June 5, 1984)

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the District Court's finding that the plaintiffs did not establish discriminatory intent is

VACATED: and that the judgment of the District Court in this cause is REVERSED insofar as it holds that Marengo County, Alabama's at large election system did not have a discriminatory result as of the time of trial; and that this cause is REMANDED for further proceedings in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

Entered: May 14, 1984
For the Court: Spencer D. Mercer,
Clerk

By: /s/ illegible
Deputy Clerk

ISSUED AS MANDATE: June 5, 1984

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*Honorable John Minor Wisdom, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

APPENDIX K

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7796

United States of America,
Plaintiff-Appellant,

v.

Marengo County Commission, et al,
Defendants-Appellees.

On Appeal from the United States
District Court for the Southern District
of Alabama

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

(Filed June 11, 1984)

Notice is hereby given that Marengo County, Alabama, a body corporate; the Marengo County Commission, governing body of Marengo County Commission; D. W. Holt, Grey Etheridge, Jimmie Brame, and Wiley J. Stephens, Jr. (successor in office to James W. Edmond), Members of the Marengo County Commission; the Board of Education of Marengo County, Alabama; Thomas N. Miller (successor in office to M. W. McKee), President of Board of Education of Marengo

County, Alabama; Joe L. Mason, Robert Tucker, Wallace Flowers, Moses Lofton, Members of the Board of Education of Marengo County, Alabama; Sammie Daniels, Judge of Probate of Marengo County, Alabama, Dwaine Sealey, Clerk of the Circuit Court of Marengo County, Alabama, and W. H. "Billy" Smith, Sheriff of Marengo County, Alabama, all three as members of the Board of Supervisors of Elections of Marengo County, Alabama, the Defendants-Appellees in the above-styled cause hereby appeal to the Supreme Court of the United States from May 14, 1984 decision and judgment by this Court in the above-styled action, adjudging and decreeing statutes of the State of Alabama relating to the composition and method of election of the Marengo County Commission and the Board of Education of Marengo County to be unconstitutional.

This appeal is taken pursuant to 28 USC, Section 1254, paragraph (2).

Respectfully submitted,

/s/ Cartledge W. Blackwell, Jr.
Of Counsel for Defendants-Appellees

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Certificate of Service

I do hereby certify that I have served a copy of the foregoing Notice of Appeal upon the following:

Honorable Rex E. Lee
Solicitor General
Department of Justice
Washington, D.C. 20530

William Bradford Reynolds
Assistant Attorney General

Charles J. Cooper
Deputy Assistant Attorney General

Jessica Dunsay Silver
Joan A. Magagna
Attorneys
Department of Justice
Washington, D.C. 20530

Jeff A. Sessions
United States Attorney
P.O. Drawer E
Mobile, Alabama 36601

by mailing a copy thereof to them at the above street or Post Office address by United States Mail, postage prepaid, on this 6th day of June, 1984.

/s/ Cartledge W. Blackwell, Jr.
Of Counsel for Defendants-Appellees

Act No. 17

Be It Enacted By The Legislature of Alabama:

Section 1. Section 2 of an Act approved September 19, 1923, entitled "An Act to establish a Board of Revenue of Marengo County, and for the abolishment of the Court of County Commissioners of said County" (Act No. 311, p. 188, Local Acts of Alabama, 1923), is amended to read as follows:

"Section 2. At the general election of 1956, and every four years thereafter, there shall be elected by the qualified electors of the county a president of the Board of Revenue and one member for each of the four districts of the county as herein provided; and they shall hold office for the term of four years from the first Monday after the second Tuesday in January next after their election, and until their successors are elected and qualified. The four board of revenue districts shall be constituted and composed of the election precincts of this county as now constituted or as they may hereafter be changed as required by law. The four districts shall be designated as follows: the Northeastern District, the Southeastern District, the Southwestern District and Northwestern District. These districts shall be composed of the following election precincts as follows: Northeastern District—Faunsdale, Macon, Dayton, Thomaston and McKinley precincts; Southeastern District—Magnolia, Pineville, Dixon's Mills and Shiloh precincts; Southwestern District—Myrtlewood, Hills, Nanafalia, Horse Creek, Hoboken and Sweetwater precincts; Northwestern District—Demopolis, Jefferson, Springhill, Jackson's Store and Linden precincts. The members of the Board of Revenue shall be, at the time of their appointment or election, and during their continuance in office, qualified electors of Marengo County, and each shall have been a resident of the district for two years next preceding his election or appointment."

Section 2. This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

Approved February 17, 1955
Time: 2:15 P.M.

Act No. 184

Be It Enacted by the Legislature of Alabama:

Section 1. Sections 2, 3, and 4 of An Act entitled "An Act to further provide for and regulate the selection, qualification and election of the members of the Board of Education of Marengo County," approved July 8, 1935, (Act No. 183, S. 234, Local Acts of Alabama, 1935, p. 106), are amended to read as follows:

"Section 2. The president of the board of education of Marengo County shall be elected by the qualified electors of the county-at-large, shall be a qualified elector of, and reside in the county. A member of the board shall be elected for each of the four school districts herein provided for, and he shall have been a resident and qualified elector of such district for at least two years next preceding his election. The four school districts shall be composed of the election precincts of the county as now constituted or as they may hereafter be changed by law. The school districts shall be called respectively the Northeastern School District, the Southeastern School District, the Southwestern School District, and the Northwestern School District. The Northeastern School District shall be composed of the following election precincts: Faunsdale, Macon, Dayton, Thomaston, and Mckinley; the Southeastern School District shall be composed of the following election precincts: Magnolia, Pineville, Dixon's Mill and Shiloh; the Southwestern School District shall be composed of the following election precincts: Myrtlewood, Hills, Nanafalia, Horse Creek, Hoboken, and Sweet Water; the Northwestern School District shall be composed of the following election precincts: Demopolis, Jefferson, Spring Hill, Jackson's Store and Liden.

"Section 3 A president of the board of education of Marengo County shall be elected by the qualified electors of Marengo County at the general election to be held in November 1960, and every four years thereafter, for a term to begin on the first Monday after the second Tuesday in January next following his elec-

tion and continue for four years, and until his successor is elected and qualified. The president shall be a member and the presiding officer of the board, and he shall have the same rights, privileges, powers and authority and shall perform the same duties, take the same oath, and receive the same compensation as the other members thereof, and in addition, he shall have all the power and authority and perform all of the duties now or hereafter required of the president of county boards of education under the general laws of Alabama.

"Section 4. All members of the board of education of Marengo County, except the president, shall be elected at large by the qualified voters of marengo County at the general election to be held in November 1956, and every four years thereafter, for a term to begin on the first Monday after the second Tuesday in January next following their election and continue for four years and until their successors are elected and qualified."

Section 2. This Act shall become effective immediately upon its passage and approval by the Governor, or otherwise becoming a law.

Approved July 29, 1955.
Time: 10:28 A.M.

Act No. 44

Be It Enacted by the Legislature of Alabama:

Section 1. Section 2 of an act approved September 19, 1923, entitled "An Act to establish a Board of Revenue of Marengo County, and for the abolishment of the Court of County Commissioners of said County" (Act No. 311, p. 188, Local Acts of Alabama, 1923), as amended, is further amended to read as follows:

"Section 2. A member of the Board of Revenue for the Northeastern and one for the Southeastern Districts shall be elected at the general election in 1968 and every four years thereafter; and a president thereof and a member for the Northwestern and a member for the Southwestern Districts shall be elected at the general election in 1970 and every four years thereafter. They shall each hold office for four years from the first Monday after the second Tuesday in January next after their election. The term of office of the president and the members for the Northwestern and the Southwestern Districts, serving when this Act becomes law is hereby extended until the first Monday after the second Tuesday in January 1971, and until their successors are elected and have qualified. The incumbent president and members of the board shall all continue in office until the expiration of the term for which they were elected; and the incumbent president and the members for the Northwestern and the Southwestern Districts shall in addition serve for such time as their terms are hereinabove extended. The president and each member of the board for a district shall each be elected at large by the qualified electors of the county. The four board of revenue districts shall be constituted and composed of the election precincts of this county as now constituted or as they may hereafter be changed as required by law. The four districts shall be designated as follows: the Northeastern District, the Southeastern District, the Southwestern District and the Northwestern District. These districts shall be composed of the following election precincts as follows: Northeastern District—-

Faunsdale, Macon, Dayton, Thomaston and Mckinley precincts; Southeastern District—Magnolia, Pineville, Dixon's Mills and Shiloh precincts; Southwestern District—Myrtlewood, Hills, Nanafalia, Horse Creek, Hoboken and Sweetwater precincts; Northwestern District—Demopolis, Jefferson, Springhill, Jackson's Store and Linden precincts. The members of the Board of Revenue shall be, at the time of their appointment or election, and during their continuance in office, qualified electors of Marengo County, and each shall have been a resident of the district for two years next preceding his election or appointment."

Section 2. This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

Approved August 16, 1966.
Time: 4:57 P.M.

Act No. 45

Be It Enacted by the Legislature of Alabama:

Section 1. Sections 3 and 4 of an act entitled "An Act to further provide for and regulate the selection, qualification and election of the members of the Board of Education of Marengo County," approved July 8, 1935, (Act No. 183, S. 234, Local Acts of Alabama, 1935, p. 106), as amended, are further amended to read as follows:

"Section 3. A president of the board of education of Marengo County shall be elected by the qualified electors of Marengo County at the general election to be held in November 1970, and every four years thereafter, for a term to begin on the first Monday after the second Tuesday in January next following his election and continue for four years, and until his successor is elected and qualified. The term of office of the president, who is serving when this Act becomes law is hereby extended until the first Monday after the second Tuesday in January 1971, and until his successor has been elected and has qualified. The incumbent president shall contunie in office until the expiration of the term for which he was elected and shall in addition serve for such time as his term is hereinabove extended. The president shall be a member and the presiding officer of the board, and he shall have the same rights, privileges, powers and authority and shall perform the same duties, take the same oath, and receive the same compensation as the other members thereof, and in addition, he shall have all the power and authority and perform all of the duties now or hereafter required of the president of county boards of education under the general laws of Alabama.

"Section 4. All members of the board of education of Marengo County shall be elected at large by the qualified voters of Marengo County. The members of the board for the Northwestern and the Southwestern School Districts shall be elected at the general election in 1968 and every four years thereafter.

The members thereof for the Northeastern and the Southeastern School Districts shall be elected at the general election in 1970 and every four years thereafter. The members of the board shall each hold office for four years from the first Monday after the second Tuesday in January next after their election and until their successors have been elected and have qualified. The term of office of the members for the Northeastern and the Southeastern School Districts, serving when this Act becomes law, is hereby extended until the first Monday after the second Tuesday in January 1971, and until their successors are elected and have qualified. All the incumbent members of the board shall continue in office until the expiration of the term for which they were elected; and the incumbent members for the Northeastern and the Southeastern School Districts shall in addition serve for such time as their terms are hereinabove extended."

Section 2. This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

Approved August 16, 1966.
Time: 4:58 P.M.

Office-Supreme Court, U.S.
FILED
OCT 12 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-243

In the Supreme Court of the United States

OCTOBER TERM, 1984

MARENGO COUNTY COMMISSION, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

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Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

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QUESTIONS PRESENTED

1. Whether the Court has jurisdiction of this appeal under 28 U.S.C. 1254(2).

2. Whether the "results" standard of the 1982 amendment to Section 2 of the Voting Rights Act of 1965 (42 U.S.C. 1973) should be applied to this case.

3. Whether Section 2, as amended, encompasses voting dilution claims.

4. Whether Section 2, as amended, is constitutional.

5. Whether the court of appeals correctly concluded that the record shows that Marengo County's voting system resulted in the dilution of black voting strength at the time of trial.

6. Whether, in the particular circumstances of this case, the court of appeals erred in placing upon appellants the burden of establishing on remand that the County's at-large voting system no longer results in the dilution of black voting strength.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-243

MARENGO COUNTY COMMISSION, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16.1 of the Rules of this Court, the Solicitor General, on behalf of the United States, moves that the appeal be dismissed or that the judgment of the court of appeals in this case be affirmed.

OPINIONS BELOW

The April 23, 1979 opinion of the district court (J.S. App. A1-A56) is reported at 469 F. Supp. 1150. The August 6, 1980 order of the court of appeals remanding the case to the district court for further proceedings (J.A. App. A61) is unreported. The July 30, 1981 order of the district court on remand (J.S. App. A64-A67) is unreported. The May 14, 1984 opinion of the court of appeals (J.S. App. A69-A120) is reported at 731 F.2d 1546.

JURISDICTION

The judgment of the court of appeals (J.S. App. A121-A122) was entered on May 14, 1984. A notice of appeal (J.S. App. A123-A125) was filed on June 11, 1984, and the appeal was docketed on August 10, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2). We discuss the Court's jurisdiction at pages 6-8, *infra*.

STATEMENT

1. The United States filed this action in 1978, alleging that the at-large system for electing the County Commission and Board of Education of Marengo County, Alabama, unlawfully "diluted" the voting rights of black residents of the County in violation of 42 U.S.C. 1971, 42 U.S.C. 1973, and the Fourteenth and Fifteenth Amendments. The case was consolidated with a private class action filed by black voters in 1977 (J.S. App. A74 & n.9). Following a trial, the district court entered judgment for appellants on April 23, 1979 (*id.* at A57-A58). In a memorandum opinion accompanying the judgment, the court held that the plaintiffs had failed to meet their burden of establishing that the at-large scheme was created or maintained with a racially discriminatory purpose (*id.* at A1-A56).

The United States appealed.[1] On August 6, 1980, the court of appeals vacated the district court's judgment and remanded the case for further proceedings, "including the presentation of such additional evidence as is appropriate," in light of this Court's intervening decision in *City of Mobile* v. *Bolden*, 446

[1] The private plaintiffs did not pursue an appeal (J.S. App. A65).

U.S. 55 (1980). See J.S. App. A61. In *Bolden*, the Court held that discriminatory intent must be proved to establish a violation of the Constitution and Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973. See J.S. App. A61.

2. While this case was pending before the district court on remand, the court of appeals decided *Lodge* v. *Buxton*, 639 F.2d 1358 (5th Cir. 1981), which held that proof of a governing body's unresponsiveness to the needs of minority citizens was essential to prove discriminatory intent under *Bolden*. On July 30, 1981, the district court, relying on *Lodge* v. *Buxton*, again entered judgment for appellants, this time on the ground that the United States had failed to prove unresponsiveness (J.S. App. A62-A67). The district court rejected the United States' offer to present additional evidence, including evidence concerning the reasons for the institution of at-large elections in the County. The court believed that such evidence "would add nothing," because in the absence of proof of unresponsiveness by appellants, the government's suit "must fail" (J.S. App. A67).

The United States again appealed, and the court of appeals held the appeal in abeyance pending this Court's decision on review of the Fifth Circuit's decision in *Lodge* v. *Buxton* (J.S. App. A68). On July 1, 1982, this Court held in *Lodge* that proof of unresponsiveness is not essential to establish intentional discrimination in the context of a voting dilution claim. *Rodgers* v. *Lodge*, 458 U.S. 613, 625 n.9 (1982).

3. The court of appeals subsequently rendered its decision in the instant case on May 14, 1984 (J.S. App. A69-A122). The court of appeals concluded that the case should be decided by application of the

intervening 1982 amendment to Section 2 of the Voting Rights Act (Pub. L. No. 97-205, 96 Stat. 131 (to be codified at 42 U.S.C. 1973), which prohibits not only any electoral system adopted or maintained with discriminatory purpose, but also any such system which "results in a denial or abridgement of the right * * * to vote on account of race or color * * *".[2] The court held that the 1982 amendment applies to pending cases (J.S. App. A76-A80); that it encompasses claims of voting dilution (*id.* at A80-A83); and that it is constitutional (*id.* at A83-A96).

The court of appeals further concluded that "[t]he record compels a finding that, as of the time of trial, Marengo County's at-large system resulted in an abridgement of black citizens' opportunity to participate in the political process and to elect representatives of their choice [in] violation of the results test adopted by Congress in section 2 of the Voting Rights Act" (J.S. App. A119). The court summarized the evidence supporting its conclusion (*ibid.*):

> The evidence reveals racially polarized voting; a nearly complete absence of black elected officials; a history of pervasive racial discrimination that has left Marengo County blacks economically, educationally, socially, and politically disadvantaged; polling practices that have impaired the ability of blacks to register and participate actively in the electoral process; election features that enhance the opportunity for dilution; and considerable unresponsiveness on the part of some public bodies.

The court of appeals nevertheless declined the United States' request that the court render judg-

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[2] Section 2, as amended, is reproduced at J.S. 5.

ment in the government's favor and remand only for the devising of a remedy (*id.* at A96, A119). Instead, the court remanded the case for further proceedings on the merits, "to allow the parties to update [and] supplement the record with evidence that might tend to affect [the] finding of discriminatory results" (*id.* at A120). The court of appeals explained that it was taking this approach because conditions might have changed in Marengo County during the five years since the case had been tried (*id.* at A119). However, in the particular circumstances of this case, because the evidence adduced at the time of trial established a "clear violation" of the "results" test in the amended Section 2 of the Voting Rights Act, the court of appeals placed on appellants the burden of establishing on remand "that circumstances have changed sufficiently to make [its] finding of discriminatory results in 1978 inapplicable in 1984" (*id.* at A119-A120).

ARGUMENT

The appeal should be dismissed for lack of jurisdiction under 28 U.S.C. 1254(2), because the court of appeals did not definitively resolve the validity of the at-large electoral system under Section 2 of the Voting Rights Act. The court of appeals instead remanded for further proceedings on that question, including the receipt of additional evidence. Treating the jurisdictional statement as a petition for a writ of certiorari (see 28 U.S.C. 2103), the petition should be denied because the case is in an interlocutory posture and because the court of appeals' disposition of the issues presented was clearly correct and does not conflict with the decisions of this Court or of any other court of appeals. If the Court concludes that it has appellate jurisdiction under 28

U.S.C. 1254(2), the judgment of the court of appeals should be affirmed.

1. This case is not within the Court's appellate jurisdiction. Under 28 U.S.C. 1254(2), this Court has jurisdiction to entertain an appeal from a decision by a court of appeals holding a state statute invalid as repugnant to the Constitution, treaties, or laws of the United States. Appellants contend (J.S. 6, 14-15 & n.27) that the court of appeals has held that the state statutes providing for the at-large election of the members of the County Commission and Board of Education [3] are invalid under Section 2 of the Voting Rights Act and that this case therefore falls within the scope of 28 U.S.C. 1254(2). This contention is incorrect.

In *Slaker* v. *O'Connor*, 278 U.S. 188, 189 (1929), the Court held that, under the predecessor to Section 1254(2), "appeals to this Court from circuit courts of appeal lie only from final judgments or decrees * * *." *Slaker* was followed without comment in *South Carolina Electric & Gas Co.* v. *Flemming*, 351 U.S. 901 (1956) (per curiam). Although the precedential force of these decisions has been questioned, they have not been overruled. See *New Orleans* v. *Dukes*, 427 U.S. 297, 301-302 (1976); *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 927 (1975); *El Paso* v. *Simmons*, 379 U.S. 497, 502 (1965); *Chicago* v. *Atchison T. & S.F. Ry.*, 357 U.S. 77, 82-83 (1958). In any event, there is no occasion here to resolve the controversial aspect of *Slaker*. The Court has questioned the application of the finality rule of *Slaker* where a court of appeals definitively re-

[3] The governing statutory provisions, Acts Nos. 17 and 184 of the 1955 Alabama Legislature and Acts Nos. 44 and 45 of the 1966 Legislature, are reproduced at J.S. App. A127-A132.

solved the question of the validity of a state statute and all that remained on remand was further proceedings on matters of state law (see *New Orleans* v. *Dukes*, 427 U.S. at 302; *El Paso* v. *Simmons*, 379 U.S. at 501-502) or the formal entry of judgment (*Chicago* v. *Atchison, T. & S.F. Ry.*, 357 U.S. at 82-83). Compare *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 476-486 (1975). But the Court has indicated that even if the finality rule were to be relaxed in those instances, an appeal to this Court still would not lie under 28 U.S.C. 1254(2) where the court of appeals considered the validity of a state statute only in connection with a ruling on the propriety of preliminary relief and thus did not definitively resolve the question. *Doran* v. *Salem Inn, Inc.*, 422 U.S. at 927.

It follows a fortiori that an appeal does not lie under 28 U.S.C. 1254(2) in this case. The court of appeals did not invalidate the state statutes referred to by appellants. To be sure, the court held that "as of the time of trial, Marengo County's at-large system resulted in an abridgement of black citizens' opportunity to participate in the political process and to elect representatives of their choice" (J.S. App. A119). However, the court of appeals rejected the United States' request that it render judgment invalidating the county's at-large system and remand only for the purpose of devising a remedy (*ibid.*). The court instead afforded appellants an opportunity to demonstrate on remand that the at-large system no longer adversely affects minority voters in Marengo County and thus is not invalid under federal law (*id.* at A120, A122). Compare *Minnick* v. *California Department of Corrections*, 452 U.S. 105, 120-127

(1981).[4] The court of appeals' judgment therefore is clearly not definitive even with regard to the validity of the at-large election system and any state statutes providing for such a system, much less with regard to *all* issues in the case, including the nature of an appropriate remedy. For this reason, the appeal should be dismissed for want of jurisdiction under 28 U.S.C. 1254(2).

2. Treating the appeal as a petition for a writ of certiorari (see 28 U.S.C. 2103), the petition should be denied. In view of the interlocutory nature of the court of appeals' decision, none of the issues raised by appellants is ripe for review. If appellants prevail on remand, there will be no need for them to seek review in this Court on any of the questions they now present. On the other hand, if they are unsuccessful on remand, they may raise whatever issues they deem appropriate, including the ones they now present, in an appeal to the court of appeals from the district court's final judgment, and they may thereafter seek further review in this Court. See

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[4] In *Minnick*, the Court held that the decision of the state court of appeals was not final for purposes of the Court's certiorari jurisdiction under 28 U.S.C. 1257(3) because the state court had remanded for further proceedings on the federal issue. In *New Orleans* v. *Dukes*, 427 U.S. at 302, the Court cited *Cox Broadcasting Corp.* v. *Cohn*, *supra* — which involved the finality requirement of 28 U.S.C. 1257 — in support of its conclusion that the judgment of the court of appeals was final for purposes of 28 U.S.C. 1254(2), thereby indicating that 28 U.S.C. 1254(2) and 28 U.S.C. 1257(3) should be read in a like fashion. See R. Stern & E. Gressman, *Supreme Court Practice and Procedure* 67 (5th ed. 1978). The Court's dismissal of the writ in certiorari in *Minnick* therefore strongly supports dismissal of the appeal in this case.

Toledo Scale Co. v. *Computing Scale Co.*, 261 U.S. 399, 418 (1923). At that time, the Court would have the benefit of an updated record directed specifically to the current validity of the County's at-large system.

3. If the Court concludes that it does have jurisdiction of the appeal, it should summarily affirm the judgment below. The court of appeals' decision is consistent with the decisions of this Court and other courts of appeals, and appellants present no question warranting plenary review by this Court.

a. The court of appeals correctly held (J.S. App. A76-A80) that the "results" test of amended Section 2 should be applied to this case. Under this Court's decisions, when Congress has amended the governing law while a case is pending on appeal, the court of appeals ordinarily should apply the new law to the case unless Congress has indicated that it does not intend that law to apply to pending cases or manifest injustice would result from doing so. *Bradley* v. *Richmond School Bd.*, 416 U.S. 696, 711-721 (1974).

The 1982 amendment to Section 2 of the Voting Rights Act became effective upon its enactment on June 29, 1982 (Pub. L. 97-205, § 6, 96 Stat. 135), well before this case was decided. The legislative history establishes that Congress intended the courts to apply amended Section 2 to cases pending on the date of its enactment. Representative Sensenbrenner, for example, explained that "Section 2 * * * will take effect immediately, and will, of course, apply to pending cases in accordance with the well established principles of *Bradley* v. *City of Richmond*, 416 U.S. 686 (1974), and *United States* v. *Alabama*, 362 U.S. 602 (1980)." 128 Cong. Rec. H3841 (daily ed. June

23, 1982).[5] See also *id.* at S7095 (daily ed. June 18, 1982) (remarks of Sen. Kennedy). Moreover, this Court has already indicated that the 1982 amendment to Section 2 should be applied to cases pending on appeal: in *Escambia County* v. *McMillan*, No. 82-1295 (Mar. 27, 1984), the Court vacated the decision of the Fifth Circuit and remanded for reconsideration in light of the 1982 amendment.

It also is clear that no injustice has resulted from the court of appeals' application of the amended Section 2 to this case. When this case was tried, the evidence was addressed to the so-called "*Zimmer* factors," drawn from the court of appeals' opinion in *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd on other grounds *sub nom. East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976) (per curiam). The district court also relied on those factors in determining that appellants' at-large electoral scheme did not unconstitutionally dilute minority voting strength (J.S. App. A9). The standards applied in assessing dilution claims under the amended Section 2 of the Voting Rights Act are patterned after the *Zimmer* standards. Compare S. Rep. 97-417, 97th Cong., 2d Sess. 28-29 (1982), with *Zimmer* v. *McKeithen*, 485 F.2d at 1305. Furthermore, the court of appeals remanded the case to afford appellants an opportunity to present additional evidence on whether the at-large voting scheme currently has discriminatory results (J.S. App. A120).

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[5] In *United States* v. *Alabama*, which also was a voting rights case, the Court gave effect to a statutory amendment that was enacted while the case was pending before this Court after certiorari was granted. 362 U.S. at 604.

Thus appellants have not been prejudiced by the court's application of the amended Section 2.[6]

b. Nor did the court err in ruling that the amended Section 2 encompasses voting dilution claims (J.S. App. A80-A81). The amended Section 2 was "[s]pecifically designed to reach claims of voting dilution." *Major* v. *Treen*, 574 F. Supp. 325, 341 (E.D. La. 1983) (three-judge court). The 1982 amendment was a direct congressional response to this Court's decision in *City of Mobile* v. *Bolden*, *supra*, a dilution case (see, *e.g.*, S. Rep. 417, *supra*, at 15-17), and the Senate Report explicitly states that the amended Section 2 "without question is aimed at discrimination which takes the form of dilution" (*id.*

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[6] The lower courts routinely have applied the amended Section 2 to cases pending on the date of its enactment. See, *e.g.*, *Jones* v. *City of Lubbock*, 727 F.2d 364 (5th Cir. 1984); *United States* v. *Dallas County Comm'n*, 739 F.2d 1529, 1534 (11th Cir. 1984); *Rybicki* v. *Illinois Bd. of Elections*, 574 F. Supp. 1147 (N.D. Ill. 1983) (three-judge court); *Major* v. *Treen*, 574 F. Supp. 325 (E.D. La. 1983) (three-judge court); *Gingles* v. *Edmisten*, No. 81-803-CIV-5 (E.D. N.C. Jan. 27, 1984) (three-judge court), appeal pending, No. 83-1968; *Terrazas* v. *Clements*, 581 F. Supp. 1329 (N.D. Tex. 1984) (three-judge court). The only exception of which we are aware is *McMillan* v. *Escambia County*, 688 F.2d 960 (5th Cir. 1982). However, the court of appeals in that case did not suggest that the amendment should not ordinarily be applied to pending cases. To the contrary, it acknowledged the legislative history we have quoted in the text indicating that the amendment *should* apply to pending cases. The court simply deferred resolution of the Voting Rights Act issue until a later date and disposed of the case by finding a Fourteenth Amendment violation. 688 F.2d at 962 n.2. This Court later vacated the court of appeals' decision and remanded for consideration of plaintiffs' dilution claim under amended Section 2. *Escambia County* v. *McMillan*, No. 82-1295 (Mar. 27, 1984).

at 30 n.12). As the court of appeals correctly observed, the legislative history "is replete with discussion of *how* the amendment will apply to vote dilution cases, [but t]here is not a word to suggest any doubt about *whether* it would apply to such cases" (J.S. App. A82 (second emphasis supplied by the court)). The court of appeals' ruling in this regard is consistent with the decisions of other federal courts, which uniformly have applied the amended Section 2 to voting dilution claims.[7]

c. The court of appeals also correctly held that the amended Section 2 is constitutional. In a comprehensive analysis upon which we rely (J.S. App. A83-A96), the court ruled that the amended Section 2 is an appropriate exercise of Congress's powers to enforce both the Fourteenth and Fifteenth Amendments.[8]

In *City of Mobile* v. *Bolden, supra*, this Court held that the Fourteenth and Fifteenth Amendments prohibit only purposeful discrimination in voting. Under this Court's decisions, however, it is beyond question that in enforcing those amendments, Congress may prohibit voting practices that are not intentionally

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[7] See, *e.g.*, *Jones* v. *City of Lubbock, supra*; *Buchanan* v. *City of Jackson*, 708 F.2d 1066, 1072 (6th Cir. 1983); *Ketchum* v. *Byrne*, No. 83-2044 (7th Cir. Aug. 14, 1984), slip op. 10; *Buskey* v. *Oliver*, 565 F. Supp. 1473, 1482 & n.21 (M.D. Ala. 1983); *Chapman* v. *Nicholson*, 579 F. Supp. 1504, 1508 (N.D. Ala. 1984); *Rybicki* v. *Illinois Bd. of Elections*, 574 F. Supp. at 1148; *Major* v. *Treen, supra*; *Gingles* v. *Edmisten*, slip op. 11; *Terrazas* v. *Clements, supra*.

[8] The court of appeals' decision upholding the constitutionality of the amended Section 2 is consistent with the decisions of other federal courts. See, *e.g.*, *Jones* v. *City of Lubbock*, 727 F.2d at 372-375; *Major* v. *Treen*, 574 F. Supp. at 342-349.

discriminatory, as long as the legislation is designed to carry out the basic objectives of the amendments. See, *e.g.*, *City of Rome* v. *United States*, 446 U.S. 156 (1980), and *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966) (upholding Section 5 of the Voting Rights Act, which requires preclearance of all changes in voting practices in covered jurisdictions to determine whether they are discriminatory in purpose or effect); *Oregon* v. *Mitchell*, 400 U.S. 112 (1970) (upholding a five-year nation-wide ban on the use of literacy tests); and *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966) (upholding a prohibition on a state's use of a literacy test when applied to Spanish-speaking citizens educated in American flag schools). As the Court stated in *City of Rome* v. *United States*, 446 U.S. at 173, "the prior decisions of this Court foreclose any argument that Congress may not * * * outlaw voting practices that are discriminatory in effect." See also *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980).

The 1982 amendment to Section 2 is plainly designed to carry out the objectives of the Fourteenth and Fifteenth Amendments. In amending Section 2, Congress specifically concluded "that to enforce fully the Fourteenth and Fifteenth Amendments, it is necessary that Section 2 ban election procedures and practices that result in a denial or abridgement of the right to vote." S. Rep. No. 417, *supra*, at 40. In reaching this conclusion, Congress found "(1) that the difficulties faced by plaintiffs forced to prove discriminatory intent by case-by-case adjudication create a substantial risk that intentional discrimination barred by the Fourteenth and Fifteenth Amendments will go undetected, uncorrected and undeterred unless the results test proposed for section 2 is

adopted; and (2) that voting practices that have discriminatory results perpetuate the effects of past purposeful discrimination" (*ibid.* (footnote omitted)). Under this Court's decisions, then, there can be no doubt that the amended Section 2 is an appropriate exercise of Congress's authority to enforce the Fourteenth and Fifteenth Amendments.[9]

d. The court of appeals correctly concluded on the basis of its review of the record that, at the time of trial, the County's at-large election system resulted in an abridgement of black citizens' opportunity to participate in the political process, in violation of the amended Section 2 of the Voting Rights Act (J.S. App. A96-A119). The district court had concluded that the ultimate inquiry was whether intentional discrimination was shown, and its assessment of the "*Zimmer* factors" was directed to that ultimate question (see J.S. App. A51, A52, A55-A56). The amended Section 2 of the Voting Rights Act, however, does not require a finding of intentional discrimination; it focuses instead on whether the voting practice in question results in an abridgement of the rights of black citizens. The court of appeals there-

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[9] Nor can it be said that in amending Section 2, Congress has wrongfully usurped this Court's powers by attempting to overrule the decision in *City of Mobile* v. *Bolden*. *Bolden* held that proof of intentional discrimination was necessary to establish a violation of the Fourteenth or Fifteenth Amendment. But, as the court of appeals correctly recognized, "nothing in *Mobile* v. *Bolden* suggested that Congress could not prohibit by statute what the Court had declined to forbid under the Constitution" (J.S. App. A94 (footnote omitted)). Indeed, on the same day *Bolden* was decided, this Court in *City of Rome* reaffirmed the validity of the statutory preclearance requirement, including its attendant "effects" test. 446 U.S. at 173-178.

fore properly reviewed the district court's findings and conclusions under the new statutory standard and the "totality of circumstances approach" required by Section 2, taking into account the various relevant factors. See Pub. L. No. 97-205, § 3(b), 96 Stat. 134 (to be codified at 42 U.S.C. 1973(b)).

The court of appeals first recognized that the legislative history of the 1982 amendment to Section 2 establishes that the existence of racially polarized voting ordinarily is the keystone of a voting dilution case (J.S. App. A103-A104). The court noted in this regard that "[t]he district court found extremely strong evidence of polarized voting in elections before 1978, and continuing, though somewhat reduced, polarization in the 1978 elections" (*id.* at A105 (footnote omitted)); see *id.* at A11-A16. It concluded that "[r]ace is, as it has been since blacks were allowed to vote, the main issue in Marengo County politics" (*id.* at A105 (footnote omitted)). Again like the district court (see *id.* at A54-A55), the court of appeals also found an historical record of discrimination in Marengo County and lingering effects of that discrimination continuing to the time of trial (*id.* at A105-A109). On this point, the court of appeals noted the extensive litigation required to overcome the resistance to desegregation of the County's schools, to end discrimination in selection of grand and petit juries, and to enforce the rights of blacks to vote and run as candidates. The court further noted that because blacks are poorer and less educated, they have less political influence and register and vote in significantly lower numbers than whites (J.S. App. A107), and it found the district court's decision in these circumstances—which attributed lower black participation to "apathy" or "a failure of blacks to turn out their votes"—to be unsupported by

the record and based on speculation (*id.* at A107-A109). Similarly, the court of appeals relied on the district court's findings (see *id.* at A22-A23, A55) that two election practices in the County had exacerbated the deficiencies in black participation: the low number of black poll officials and the failure of the Board of Registrars to follow state law that required it to visit rural areas of the County, where more blacks than whites resided (J.S. App. A110-A112).

The court of appeals also assessed other factors under the totality of circumstances approach required by the amended Section 2. It noted, for example, that there is a majority vote requirement in the Democratic Primary Election (J.S. App. A112), which the district court found was "for all intents and purposes *the election* in Alabama" (*id.* at A44 (emphasis supplied by the district court)). The district court found this majority vote requirement to be a factor that enhanced a finding of dilution (*ibid.*) because of the history of white candidates' winning of runoff elections (*id.* at A11-A15). The court also noted that as of 1978, no black had ever been elected to the Board of Education or County Commission and that only one black was elected to a County office, that of County Coroner (*id.* at A114-A115).

In addition, the court of appeals relied upon the district court's finding that there was no strong state policy either for or against at-large elections (*id.* at A114-A115; see *id.* at A38-A39), noting that the at-large system was adopted in 1955, one year after this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), a fact that supported an inference that it was a "direct response to the prospect of increased black political participation" (J.S. App. A114). Finally, the court found a lack of responsiveness by the Board of Education and Board of Regis-

trars to minority needs (J.S. App. A115-A118). The court of appeals rejected the district court's effort to discount the importance of the Board of Education's performance, concluding that although it "may finally be providing equal education it has done so only after three decades of resistance, and only because the courts ordered it to do so" (*id.* at A117).

In sum, the conclusion reached by the court of appeals, after a thorough assessment of the record and findings and conclusions of the district court in light of the 1982 amendment to Section 2 of the Voting Rights Act, was amply supported and clearly correct. As explained above, the court of appeals relied in large measure on factual findings made by the district court, and where it differed with the district court, it did so principally with regard to the conclusions to be drawn from those facts in light of the new legal standards in Section 2. The court of appeals' resolution of these issues in this particular factual context does not warrant plenary review.

e. The court of appeals also did not err in the circumstances of this case in placing upon appellants the burden of establishing on remand that the at-large system no longer operates to dilute minority voting strength. The court found that the evidence adduced by the government at trial established that the at-large system resulted in an abridgement of the right of black citizens to participate in the political process and to elect representatives of their choice. On the basis of that finding, the court could have rendered judgment for the government and remanded the case for entry of relief. But because five years had elapsed since the time of trial, the court elected to remand the case to allow the parties to update and supplement the record with evidence that might affect the finding of discriminatory results. Because, in the

court of appeals' view, the evidence at trial was sufficient at the very least to establish a prima facie case of a violation of Section 2, it was within the court's discretion to place upon appellants the burden of proving that changed circumstances nevertheless warrant entry of judgment in their favor.

CONCLUSION

The appeal should be dismissed. Treating the papers whereon the appeal is taken as a petition for a writ of certiorari, the petition should be denied. In the alternative, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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